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SNEAKING AROUND IN THE LEGAL PROFESSION: INTERJURISDICTIONAL UNAUTHORIZED PRACTICE BY TRANSACTIONAL LAWYERS

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I. INTRODUCTION—CHANGE AND TRADITION IN THE LEGAL PROFESSION

The quiet clubbiness that once characterized the practice of law in the United States is rapidly disappearing as new realities announce their clamorous arrival. Evaporating at a great rate—judging speed of change in historical terms—are many traditionally accepted and functionally important features of the legal profession of another day. Disappearing or dead are such sturdy former fixtures as the exclusivity of traditional bar self-policing. Also gone is the at-one-time widely acknowledged hegemony of the American Bar Association as the exclusive source of lawyer code pronouncements on lawyer disciplinary regulation.[1] Courts, under the thrall of bar associations, at one time claimed the exclusive right to regulate lawyers.[2] Although one still finds the rhetoric of judicial exclusivity,[3] the reality is that lawyer reg-

1. The ABA has been the exclusive source of lawyer code formulations that apply in almost every state (with the notable and, recently, partial exception of California) in this century. The ABA promulgated the Canons of Ethics of 1908, the Model Code of Professional Responsibility of 1969, and the Model Rules of Professional Conduct of 1983. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6 (1986). While the states in recent years have shown some independence in varying from the ABA's recommendations, including some key provisions such as confidentiality, it is still generally true that the ABA's impress is dominant. *Id.* But, on many issues covered by traditional lawyer codes, the ABA, in its 1983 Model Rules of Professional Conduct, retreated almost entirely to either relatively marginal regulation or, more commonly, simply restating in adoption-by-reference fashion, the requirements and permissions of other law, such as the law of agency, crime, tort, and contract. *Id.* at 49.

2. *See generally* WOLFRAM, *supra* note 1, § 2.6.

3. *E.g.*, Kury v. Commonwealth State Ethics Comm'n, 435 A.2d 940, 942 (Pa. Commw. Ct. 1981) (legislature violated state constitutional limitations on separation of powers in legislating one-year period during which former government official may not represent client before official's former agency); Williams v. Bordon's, Inc., 262 S.E.2d 881, 884 (S.C. 1980) (per curiam) (statute granting immunity to lawyer legislators from court appearances during legislative session unconstitutionally interfered with judicial branch of government). *See* ABA Recommendations for the Evaluation of Disciplinary Enforce-

ulation is increasingly found in the form of legislation or administrative[4] regulation, some of which is sought out by lawyer organizations themselves.[5] Efforts of an older time to develop a strong and widely shared moral sense across the professional community seem to have been abandoned as a bar project, particularly in metropolitan areas. The bar seems to have retreated, if sometimes reluctantly, from activities that seemed at the time, and which seem now, to be aimed more at protecting lawyer self-interest rather than at protecting clients or the public.[6]

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ment, Recommendation 1 (adopted February, 1992), *in* JOHN S. DZIENKOWSKI, SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 682 (1994) ("Regulation of the legal profession should remain under the authority of the judicial branch of government.").

4. A significant recent example of administrative regulation was an invitation to such an enterprise that may well have been insincere—a form of "regulate if you dare." *See* ABA Working Group on Lawyers' Representation of Regulated Clients, LABORERS IN DIFFERENT VINEYARDS: REPORT TO THE HOUSE OF DELEGATES (June 11, 1993). I refer to the Vineyards recommendations of the ABA in response to the Kaye-Scholer controversy which involved the federal banking agency OTS (Office of Thrift Supervision). Determining that lawyers can gain only little guidance on how to conduct themselves in similar settings, the Vineyards report recommended the development of more specific guidelines, in part through work of the affected administrative agencies. *See id.* at 11–12. For an excellent, recent article summarizing the issue, see Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994).

5. A recent and quite remarkable example that has not yet been chronicled is the sweep across the country of "LLP" and similar legislation. These statutes have, in brief, made it possible for a law firm that continues to be managed as a partnership to have the limited liability protection of a corporation. *E.g.*, D.C. CODE ANN. § 41-143 (Supp. 1994); N.Y. PARTNERSHIP LAW § 121-1500 (McKinney Supp. 1995); OHIO REV. CODE ANN. § 1775.61 (Anderson Supp. 1994); *see generally Developments In the Law—Lawyers' Responsibilities And Lawyers' Responses*, 107 HARV. L. REV. 1547, 1658–64 (1994) (reviewing development of LLP concept). The organized bar and lawyers generally have, for obvious reasons of self-interest, been solidly behind this resort to legislative regulation. What further role the courts may have is not entirely clear. At least one possibility is that courts may reassert their "traditional" inherent power to regulate lawyers and require, for example, that the limited liability law partnership inform clients, in writing, of their reduced liability exposure. *Cf.* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674, 676 (Ga. 1983) (when lawyer holds himself out as member of law firm, lawyer will be liable for professional misdeeds of other members). For other authorities and a discussion, which suggests that limited liability enacted by legislatures may be arrested by courts in the exercise of their inherent power to regulate lawyers and then criticizes that result, see David Paas, *Professional Corporations and Attorney-Shareholders: The Decline of Limited Liability*, 11 J. CORP. L. 371, 383–389 (1986).

6. Some of the worst bar tendencies of this sort seem to have been reined in—although not eliminated—after the Supreme Court applied federal antitrust laws to bar associations. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 781–793 (1975) (state bar "minimum fee schedule" constituted unlawful price-fixing in violation of federal antitrust laws); *see generally* WOLFRAM, *supra* note 1, § 2.4.1 at 38–48 (discussing Supreme Court's decision in *Goldfarb* and federal anticompetitive activities of bar associations).

Some, but hardly all, of the transformations accompanying the rapid pace of change in the American legal profession are applaudable developments.[7] Wearing my own sentiments on my sleeve (and I suspect I am not alone), I do not regret the passing over of such dysfunctional features of the traditional bar, such as the conspiracy of silence, under which lawyers tacitly agreed not to sue or serve as expert witness against other lawyers;[8] the non enforcement of lawyer codes—with the trendy code intended merely to serve, as one media critic has put it,[9] as "lip service to our better selves"; and hypocritical differentiation in such matters as bar discipline (i.e. winking at the faults of lawyers in large firms, while focusing on largely victimless offenses, such as advertising and solicitation by small-time practitioners); and character determinations in bar-admission committees that seemed to have a class, race, or gender-based bias.[10]

A. Contemporary Interstate Law Practice

Thus has the practice of law, for better as well as for worse, been transformed in recent decades. The most salient change, for present purposes, is the increasingly interstate nature of the law practice of an increasing number of transactional[11] and litigation lawyers. In that

7. For an interesting overview and collection of perspectives, see Symposium, *The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 333 (1994).

8. *See* WOLFRAM, *supra* note 1, § 5.6.1 at 207–08 (some lawyers feel it is against etiquette of bar to assist other attorneys' clients in bringing malpractice suits); Richard Perez-Pena, *When Lawyers Go After Their Peers: The Boom in Malpractice Cases*, N.Y. TIMES, Aug. 5, 1994, at A23 (clients are wise to negligence of many practicing attorneys and to possibility of collecting large settlements from attorneys' insurance companies); *see generally* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994) (describing legal malpractice as traditionally hushed subject and discussing status and frequency of malpractice currently).

9. *See* THOMAS D. MORGAN AND RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 1 (6th ed. 1995) (reprinting 1975 Doonesbury cartoon).

10. M.A. Cunningham, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 TUL. L. REV. 1015, 1036–42 (1992) (discussing structure of bar and inclusion of attorneys outside traditional socioeconomic norms of profession); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498–506 (1985) (discussing bar association character screening process).

11. By a "transactional" lawyer, I refer to any lawyer conducting a matter for a client that does not involve appearing in court. For example, a lawyer may enter into a state solely for the purpose of interviewing clients in order to determine whether an actionable claim exists. The lawyer may frame the pleadings, but will not take the ultimate step of filing a lawsuit in the state's courts. *Cf.* Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 210 (Md. 1989). According to the *Kennedy* court, a lawyer admitted to local federal court, but not to the state's own courts, could not come into that state for the purpose of sorting through collection work clients to ferret out only those defendants subject to service in jurisdictions, including local federal courts, in which the lawyer was per-

regard, the practice of law has mimicked the increasingly multijurisdictional nature of the business of their clients. Even manufacturing clients, who are rooted at a particular geographical place with a large physical presence and a local payroll, have always had multistate legal problems with distant suppliers, banks, customers and regulators. Increasingly, in recent decades, manufacturing has been dispersed to regional centers. From the beginning, the presently booming service industry has shown itself as much less confined to a single place than have traditional manufacturing clients. As a result, lawyers find themselves today with clients who are only blocks away or as far as a continent away. Innovations in telecommunications and transportation have made keeping in touch with distant clients almost as effective as communication with clients in the same community. For their own part, lawyers' reputations, at least in some specialties, have also spread beyond an otherwise confining web of state lines.[12] Many lawyers with a national or regional reputation are as likely to receive calls for legal services from prospective clients from distant states as from the lawyer's own jurisdiction. This series of changes has manifested itself in such structural alterations as the proliferation of out-of-state offices (we are not supposed to call them "branch" offices) of national law firms.[13] For a growing percentage of practitioners, this means that law practice has become a career consisting of collecting frequent-traveler awards as lawyers criss-cross the country and globe to serve their clients' legal needs.

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mitted to practice. *Id.* at 210. "[T]he very acts of interview[ing], analysis and explanation of legal rights constitute practicing law in Maryland." *Id.*

12. An interesting decision making this point is Finnegan v. Squire Publishers, Inc., 765 S.W.2d 703 (Mo. Ct. App. 1989). In holding that a lawyer could sue for reputational harm beyond the borders of the single state in which the lawyer was admitted to practice, the court noted that:

> Damage to a professional's reputation can occur in a state other than that in which he is professionally licensed, especially when the metropolitan area within which he practices his profession extends into two states. A professional's reputation can be damaged in the opinion of his neighbors and community members, his out-of-state clients or potential clients, as well as members of the general public in the state in which the libel . . . is published.

Id. at 706.

13. *E.g.*, Cynthia Cooper, *Branch Growth Paces City's Firms*, N.Y. L.J. Oct. 1, 1990 at S-2 (noting growth of branch offices of New York firms elsewhere, and of New York branch offices of firms based elsewhere); Alan R. Stone & Jane E. Sender, *The Branch Office Phenomena: What's In It For You?*, MASS. LAWS. WKLY. Nov. 22, 1993, at 38 (recent expansion of branch offices throughout country is function of strategic business decisions of firms).

B. Persistence of the Myth of the Stay-at-Home Lawyer

Nevertheless, certain mythic features and traditional attitudes about regulation of the legal profession have been slow to catch up with the changing realities of the practice of law. Some of those myths can still be found intertwined in the fabric of semi-official professional mythology about the largely bygone world in which the bar's leadership appears to believe it continues to practice. One such lingering myth, the subject of this symposium, is the myth of the single-state practitioner. This is a throw-back implying that law is practiced almost entirely in one's own community, from which the lawyer ventures only occasionally, and then with great deference to the foreignness of other states, their bars, and their laws.

This atavistic lawyer's world is reflected, for example, in the ABA's Model Rule 5.5(a),[14] which was carried forward from DR 3-101(B)[15] of the 1969 ABA Model Code of Professional Responsibility. Each provision announces in similar language the broad precept that a lawyer must not "practice law" in a jurisdiction where doing so would violate regulations of the profession in that jurisdiction. Such a violation, we are to believe, will subject the lawyer to discipline back home.[16] At least at the level of official pronouncement, it would appear that the prohibition against unauthorized multistate law practice is firmly in place and that lawyers are expected to observe its strictures accordingly. Moreover, the prohibition is extremely broad, extending to any "practice of law" outside a jurisdiction in which the lawyer is admitted to practice, or so it would appear.

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14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983). Model Rule 5.5 states in full:

> A lawyer shall not:
>
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
>
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Id.

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101 (1980). The rule provides in part: "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." *Id.*

16. *See generally* WOLFRAM, *supra* note 1, § 2.6.1. Both the 1969 ABA Model Code of Professional Responsibility and the 1983 ABA Model Rules of Professional Conduct (in its "Scope" at ¶¶ 17–18) indicate that a violation of a rule may lead to discipline, but that the lawyer codes should not be used to create a cause of action or give rise to a presumption of a violation of a civil norm. *Id.* Nonetheless, the lawyer codes have often been employed by courts as the appropriate measure of lawyers' responsibilities, for the purposes of a host of civil remedies in addition to professional discipline. *Id.*

Consider, then, the situation of a transactional lawyer[17] practicing in Silicon Valley, California. The client is considering purchasing a medical practice software company in Texas. Given the manner in which such transactions often unfold, the client must plan to spend a large amount of time in Texas, holding in-depth discussions with the selling corporation's personnel. The client, of course, wants Lawyer along. As matters progress toward a deal, Lawyer must conduct extensive due-diligence work, interview the selling corporation's senior executives, investigate its operations, review masses of financial and other documentary information, and hold extensive conferences with its financial people. Throughout this entire process, Lawyer will need to be negotiating drafts of multiple and vital documents with counterparts from the selling corporation's legal team. Much of this, of course, will go on in Texas and could hardly go on anywhere else.

But can it? Lawyer passed the California bar examination many years ago and did the other things necessary to be fully admitted to practice in California (along with a tenth of the nation's lawyers). However, Lawyer is not admitted in Texas and what the attorney proposes to do in Texas can only be described as the "practice of law." Does that mean that Lawyer may not set foot in Texas to do anything that can be considered the practice of law? This symposium is a testament, among other things, to the proposition that lawyers in many states have some level of concern regarding the potential problems of practicing law in other jurisdictions. In brief, neither the official pronouncements of lawyers' professional organizations, nor those of courts, offer any assurance that Lawyer would *not* be engaging in unauthorized practice by taking the contemplated trip to Texas. Lawyer will, of course, accompany her client, but, if fully informed on the issue, will do so with justifiable anger and anxiety that the law only uncertainly authorizes the attorney to do what every transactional lawyer considers to be useful, even essential, client service.

II. INSTITUTIONAL AND DOCTRINAL CONSTRAINTS ON INTERSTATE LAWYERING[18]

How did we as lawyers get ourselves into such a situation—having to doubt the legal validity of what many of us do every day, and do

17. Assume also that the lawyer is not in-house counsel. Special lenience is extended to the multistate practice of such lawyers—at least as a de facto matter. *See infra* notes 143–45 and accompanying text.

18. The standard modern piece of scholarship on multistate law practice, which is still highly relevant today, is Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975) (discussing methods for regulating

conscientiously in the belief that we are ably serving clients? One way to begin to unravel myth from modern reality may be to take an imaginative deep breath and review the regulatory landscape.

A. Federalism and the Power of State Lines

Suppose that the proverbial intelligent alien from outer space were a lawyer, and that we could press the attorney for reactions to our state of affairs concerning interstate legal practice along the lines of the following dialogue. I strongly suspect that an intelligent observer who is perfectly free of the constraints of the familiar and who is first introduced to our subject might remark, "I find the concept of unauthorized practice of law by lawyers difficult to comprehend. Why is it that what is perfectly legal to do at one place on your planet is unlawful to do at another place?" What would have to ensue would be a discourse on the political structure of nations on the planet and the less intelligible and self-contradictory persistence of "states" in the "United States." We would then have to develop the importance of the concept of "federalism" here—the formal importance of invisible state boundary lines and the consequent freedom of the states to do their own thing, largely without regard to anyone's convenience, and to insist that all who tread on their respective soils observe their respective legal vagaries.

B. The Presumed Competence of Lawyers Regarding Sister-State Law

Having begun to master federalism, I suspect the alien would remain perplexed. The alien attorney's questions would continue, "Why should lawyers, who are experts at law, be presumed to be competent only in the law of the state (or states) in which they are admitted to practice? Is that a general rule?" Off we must go on another amble. First, we would explain that, to the contrary, not only are lawyers considered competent to know and apply the laws of many other states in their practice, but the failure by a lawyer to possess and exercise that

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multistate legal practice due to increased mobility of society, uniformity of law, and increasing complexity of society). Among other recent and quite useful articles, see Marvin Comisky & Philip C. Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L.Q. 945 (1982); Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113 (1993); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967). Among older studies, see K. N. Llewellyn, *The Bar's Troubles, and Poultices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104 (1938).

competence in advising a client on multistate transactions is actionable, for both legal malpractice[19] and professional discipline[20] purposes. Because of the operation of choice of law rules—a necessary adjunct of a federalist organization of states—lawyers often find that they must work with the law of a jurisdiction in which they are not admitted to practice. Generally, a lawyer is required both to ascertain when such foreign law will apply under choice of law rules and, when it is applicable, to know and apply, with roughly equal competence, the law from the lawyer's home state as well as the law from a foreign jurisdiction.

Thus, suppose that our California lawyer never left her office in Silicon Valley and while physically there, drafted a real estate contract transferring title to Texas real estate of the selling software company to her client. In doing that work, she would be required by the California law of competent representation to exercise the care and skill of an ordinary practitioner.[21] In doing so, she must: (1) recognize occasions on which Texas law would apply to the transaction; and (2) know and, to the extent it is applicable, apply Texas law to the transaction. To be sure, feelings of trepidation about foreign law may be un-

19. *E.g.*, Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431, 436 (N.D. Ind. 1961) (lawyer admitted only in Indiana cannot defend malpractice claim on grounds that he cannot be negligent for failure to know or ascertain another state's law), *aff'd*, 324 F.2d 150 (1963), *cert. denied*, 376 U.S. 943 (1964); *In re* Roel, 144 N.E.2d 24, 28–29 (N.Y. 1957) ("When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."), *appeal dismissed*, 355 U.S. 604 (1958); Degen v. Steinbrink, 195 N.Y.S. 810, 814 (N.Y. App. Div. 1922) (New York lawyer providing legal services with respect to New Jersey land must know or learn applicable New Jersey law), *aff'd*, 142 N.E. 328 (N.Y. 1923); *see generally* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.5 (3d ed. 1989) [hereinafter MALLEN & SMITH] (in modern times, attorneys are expected to possess skill and knowledge to practice law in other jurisdictions).

Professor John S. Dzienkowski's contribution to this Symposium reflects on a variety of legal malpractice issues confronting a lawyer venturing into a multijurisdictional realm. *See generally* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967 (1995).

20. The threat of professional discipline for incompetence is more theoretical than real. Provisions of the lawyer codes, to be sure, prescribe that "[a] lawyer shall provide competent representation to a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). But the reality is that lawyers are disciplined only for egregious errors or for a pattern of incompetence or neglect. *See generally* WOLFRAM *supra* note 1, § 5.1. In any event, at least theoretically, a lawyer could be disciplined for muffing a case controlled by foreign law. No such case has been found.

21. *See* Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) ("[A]n attorney . . . is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known . . . and to discover those additional rules . . . readily found.").

derstandably more common than such feelings about local law, and the sources of gaining additional assurance are less ready to hand. Nonetheless, we must know or, at the very least, associate with a lawyer trained in the law of the distant state before giving advice or providing other legal services.[22] Some difficulties of practicing law across state boundaries are evaporating. In former times, it could be difficult to gain access to adequate research materials about the foreign state's law.[23] Now those materials are on-line. In fact, we are rapidly approaching the point at which electronic research can be performed as readily in the law of most American (and many foreign) jurisdictions as in that of one's home state. For the difficulties that still require resort to hard copy, almost every state contains at least one law library rich in the research materials of every American jurisdiction. In short, the fact that law applicable to a client's situation is foreign is no excuse for not being competent in it.

C. *Interstate Practice of Federal Law*

"But," our interplanetary colleague may ask, "if I understand correctly what federalism entails, it surely must be that the restrictions on the unauthorized practice to which you refer do not, and cannot, apply to an out-of-state lawyer who practices only *federal* law in a jurisdic-

22. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 2 (1983) ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question."); TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.01(a)(1) (1990) ("A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter . . . ."). The explicit requirement of the Texas rule, that the client be informed and consent to the noncompetent lawyer's association is a distinct improvement on the ABA Model Rule. *See* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 22 (1990). In Texas and elsewhere, the notification requirement may be independently required by the common law. *See* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation.").

23. Reflecting a concern not likely to arouse sympathy in modern-day judges, Lord Mansfield once fretted that the lawyer defendants were "country attorneys" and thus not as likely to have known the law. *See* Pitt v. Ralden, 98 Eng. Rep. 74, 75 (K.B. 1767). If the attorneys, although otherwise isolated in the Devonshire countryside, had been able to plug into Westlaw or Lexis, it is doubtful today that they would be excused from knowing the law as well as lawyers elsewhere. In any event, they would be required, at a minimum, to inform their clients of their limited ability to know "distant" law, permitting their clients the option of obtaining more knowledgeable counsel. Alternatively, the lawyers could hire associate counsel who would be in a position to know the law. On the emerging concept of a national standard of care in legal malpractice actions, see MALLEN & SMITH, *supra* note 19, § 15.5 at 877–78.

tion where the lawyer is otherwise not admitted. Suppose a California lawyer practiced only federal law in Texas—dealing, for example, only with federal taxation[24] or federal securities issues. That would be permissible by force of the Supremacy Clause, correct?" Our answer would be a guarded negative. There is a Supreme Court decision[25] holding that a nonlawyer may practice a certain kind of federal law—patent law—in a jurisdiction, regardless of the fact that the practice otherwise offends unauthorized practice rules of the jurisdiction.[26] Does this also mean that a *lawyer* admitted in another jurisdiction, but not locally, may practice the same type of law there? And does the federal preemption extend beyond arguably special areas such as patent law? On the one hand, it seems clear that a lawyer who has been suspended or disbarred by order of a state court has little hope of persuading a court that practice in an area of federal law, other than patent law, is permissible. The scant recent authority consisting solely

24. With respect to work involving federal tax laws, a further refinement that would have to be made is determining whether the work would constitute the practice of law at all—whether by lawyer or non-lawyer. The great majority, if not all, of American jurisdictions hold that the preparation of income tax returns, an activity that necessarily involves frequent questions of interpretation of tax law, does not constitute unauthorized practice of law. *See, e.g.*, Waugh v. Kelley, 555 N.E.2d 857, 859 (Ind. Ct. App. 1990) (preparation and filing of federal and state income tax returns as matter of law does not constitute practice of law requiring preparer to be admitted to Indiana bar). To avoid the issue, assume that the federal tax work consists of providing plainly legal advice to the client in Texas.

25. Sperry v. Florida, 373 U.S. 379, 386, 402–405 (1963) (Florida could not enforce otherwise valid unauthorized practice rules against federally licensed Patent Office agent who, although nonlawyer, maintained office in Florida to advise Florida citizens on federal patent law issues). The *Sperry* doctrine, of course, is not limited to non-lawyers. Thus, a Fifth Circuit decision held that Texas could not apply its (then) otherwise valid prohibition against telephone directory advertising to a lawyer, admitted to practice before the Patent Office, whose advertising was permissible under Patent Office regulations. Silverman v. State Bar of Tex., 405 F.2d 410, 414–15 (5th Cir. 1968).

26. Judge Henry Friendly added his considerable weight to the debate with his alternative holding in Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966) (en banc), *cert. denied*, 385 U.S. 987 (1966). Judge Friendly stated:

> For we hold that under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state.

Id. at 170. Note that the Second Circuit's statement assumed, at the least, a local lawyer in addition to the out-of-state counselor. The continuing validity of *Spanos* is debatable. In a per curiam decision, Leis v. Flynt, 439 U.S. 438, 442 n. 24 (1979), a majority of the Court stated that the discussion of the privileges and immunities clause in *Spanos* "must be considered to be limited, if not rejected entirely" by another per curiam decision, Norfolk & W. Ry. v. Beatty, 400 F.Supp. 234 (S.D. Ill.), *aff'd* 423 U.S. 1009 (1975). *Beatty* held that a state was not required under the privileges and immunities clause to admit *pro hac vice* a lawyer who wished to represent a client in state court to press a claim under the Federal Employers Liability Act. *Id.*

of state court decisions on transactional lawyering has been decidedly hostile.[27] When, and if, the Supreme Court ever revisits the question, it seems likely that the Court will explain that its decision in *Sperry* derived from the special federal area of patent law. The long tradition of the Patent and Trademark Office in regulating practitioners before it and the active role that the Office has taken in disciplining its own practitioners,[28] made admission there peculiarly susceptible to Supremacy Clause treatment. It is also likely that the development of a higher degree of inter-jurisdictional reciprocity of discipline[29] has, since the time of the Clark Report[30] in 1970, led to fewer instances of one type we are considering—attorneys who have been suspended by a state court but continue to maintain a license to practice in a federal court.

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27. *In re* Perrello, 386 N.E.2d 174, 179 (Ind. 1979) (suspended lawyer who took legal fees from persons and then brokered their claims to other lawyers in good standing for forwarding fee held in contempt; practice of law in federal courts is practice in state); *In re* Page, 257 S.W.2d 679, 683 (Miss. 1953) (lawyer disbarred by Supreme Court of Missouri but who remained member of bar of U.S. District Court for Western District of Missouri held in contempt of order of disbarment for representing injured railroad worker who could have filed suit in federal court under Federal Employers' Liability Act); *cf.* Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 210–11 (Md. 1989) (lawyer admitted elsewhere could not justify maintenance of office in Maryland on argument that he was practicing only in federal courts in Maryland). The court in *Kennedy* held out a theoretical, but hardly a practical, possibility that a lawyer admitted elsewhere could maintain a Maryland office for the practice of law only in his jurisdiction of admission (the District of Columbia) and in the federal court in Maryland. *Id.* at 211. Because the court had earlier held that the very act of interviewing clients to determine whether their claim was of the kind that could be brought in federal court would involve unauthorized practice, the court would only speculate about the possibility of such a practice being limited to clients referred by credentialed lawyers. *Id.* at 210–11. At that, the suggestion was made only in the context of a possible modification to the lower court's injunctive order, opening up the possibility that such a limited practice would be permissible only under supervision of a court of equity. *Id.*

28. *See infra* note 126 and accompanying text.

29. After the creation of the ABA National Databank on Professional Discipline in 1968, jurisdictions are furnished an annual list of names of lawyers publicly disciplined in all reporting states. *See* Robert B. McKay, *ABA Comm'n on Evaluation of Disciplinary Enforcement*, LAW. REG. FOR A NEW CENTURY 123 (1992) [hereinafter McKay Report]. The list is rarely used by disciplinary counsel, however, because of difficulties in matching names. *See* McKay Report, *supra* at 84, 123. As a practical matter, reciprocity in most instances consists of disciplinary counsel forwarding information *ad hoc* to other jurisdictions. *Id.* at 83. Some jurisdictions also now require that any admitted lawyer promptly notify it of disciplinary sanctions imposed by another jurisdiction, but not of the mere commencement of disciplinary proceedings elsewhere. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 22(A) (1989). As a concept, reciprocity also generally indicates that a jurisdiction will accept a finding of disciplinary violation of another jurisdiction and impose the same or a similar level of discipline. *Id.* Rules 22(D) & (E).

30. *See* ABA Spec. Comm. on Evaluation of Disciplinary Enforcement, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 121 (1970).

D. *Interstate Lawyering Through Local Lawyers*

At this point, our space traveler might interrupt to ask why transactional lawyers bother with our core question of whether it is legitimate to practice law in a distant state. "Why don't they simply and routinely associate with a lawyer in a distant state whenever a client matter calls either for application of the distant state's laws or for the lawyer's presence in the other state to perform a 'practice of law' task?" This is easier. There has been some sentiment expressed for a solution to interstate lawyering through associating local counsel.[31] An elaborate variation would be for a multistate law firm to employ locally admitted lawyers for local legal work, opening an office in each state in which client matters need personal attention from a firm lawyer.[32]

Obviously, such arrangements to hire in-state practitioners would be costly for clients and disruptive both for law firms and for commerce in general. Present day commercial transactions are simply too likely to cross state boundaries and have multijurisdictional legal implications of large consequence. Therefore, the expense and delay involved in multiplying the number of lawyers required to service a transaction by the number of states whose laws are involved is plainly not warranted.

Local counsel arrangements are equally impractical for another reason. Under existing doctrine, what would transform an out-of-state lawyer's in-state work from illegal law practice into something legally permissible is the exercise by the associated local lawyer of "supervision" over the out-of-state lawyer.[33] Similarly, work by a

31. This is most familiar in the situation of *pro hac vice* appearances. Many states require that local counsel be "associated" in such an appearance. *E.g.*, Duncan v. St. Romain, 569 So. 2d 687, 688–89 (Miss. 1990) (Louisiana lawyer who misread Mississippi law on time to appeal violated requirement of associating local counsel); *In re* Smith, 272 S.E.2d 834, 841 (N.C. 1981) (trial court had no power to waive statutory requirement that local counsel appear with out-of-state lawyer admitted *pro hac vice*). *See* Ranta v. McCarney, 391 N.W.2d 161, 167 (N.D. 1986) (Levine, J. dissenting) (would have applied general exception "to allow for association with local counsel in all matters, whether in court or not"). The dissenting opinion gave no indication of how such a system would operate, unless it was to be entirely informal.

32. *See* Florida Bar v. Savitt, 363 So. 2d 559, 560 (Fla. 1978) (unauthorized practice injunctive action ordered against out-of-state lawyer opening in-state office for large law firm); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 316 (1967) (lawyer in State I and lawyer in State II may enter into partnership by which they share in responsibility and liability of each other, so long as they indicate limitations on their practice and only individual lawyers permitted by laws of their respective states perform acts defined by state as practice of law in that state).

33. *E.g.*, Ingemi v. Pelino & Lentz, 866 F. Supp. 156, 162 (D.N.J. 1994) (general duty of local counsel to supervise lawyer admitted *pro hac vice*); *Savitt*, 363 So. 2d at 560 (terms

paralegal in a law office that would otherwise constitute unauthorized practice is transformed into authorized activity when properly supervised by an admitted lawyer.[34] However, it is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane in a jurisdiction far from New York City[35] that they modestly submit themselves to the "supervision" of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice. Nor is it evident why even mere journey-person lawyers should learn to heel to a local lawyer's obedience school supervision. A client whose tax lawyer traveled to another state to deal with a federal tax matter neither needs nor should be required to pay for another, largely useless lawyer simply to satisfy an empty legal requirement.[36]

E. Restrictions on Gaining Sister-State Licensure

"I'm beginning to understand," says our visitor, with suspicious expansiveness. "Then it would be equally intolerable for states to have significant restrictions on the ability of lawyers to become accepted into local bars in order to carry on their necessary legal duties in these jurisdictions, is that not right?" Well, it turns out, that's not it at all.

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of settlement required in-state lawyers to supervise operations of in-state branch office and prohibited unadmitted lawyers from exercising supervisory control over associates operating out of Florida office); *In re* R.G.S., 541 A.2d 977, 984 (Md. 1988) (where unadmitted bar applicant under supervision of locally admitted attorneys did not engage in unauthorized practice, although services performed otherwise would have constituted unauthorized practice).

34. *See, e.g., In re* Jones, Cal. Bar Review Dep't, No. 88-0-14338 (May 10, 1993), *reprinted in* 10 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 172 (1993) (lawyer suspended who set up personal-injury practice with non-lawyer, but failed to supervise non-lawyer who was thus enabled to engage in several violations, including misuse of client settlement funds); People v. Fry, 875 P.2d 222, 224 (Colo. 1994) (en banc) (stipulation that lawyer's failure to supervise paralegal in representing clients in bankruptcy matter resulted in paralegal's unauthorized practice of law); *In re* Opinion No. 24, 607 A.2d 962, 966–67 (N.J. 1992) (paralegals who are supervised by lawyers do not engage in unauthorized practice, although their work clearly constitutes practice of law).

35. Skadden Arps' Joseph H. Flom is admitted only in New York. 11 MARTINDALE-HUBBELL LAW DIRECTORY 1151B (1994). Martin Lipton of Wachtell, Lipton, Rosen & Katz is similarly limited. *Id.* at 1271B. I hasten to add that I have no information on how or whether those gentlemen practice law interstate. If I were a betting person, however, I would wager large sums that each practices in any jurisdiction where a client matter leads, that they do not associate local counsel, and that they do not submit themselves to the supervision of any other lawyer in these travels. I also strongly suspect they feel quite comfortable doing so, and they should.

36. *E.g., In re* Estate of Waring, 221 A.2d 193, 198 (N.J. 1966) (it is permissible for out-of-state firm to advise New Jersey estate on federal tax aspects of multistate activities).

First, it *is* correct that a lawyer admitted in one state can become admitted to practice in another state. A lawyer from California can become admitted to practice law in Texas.[37] But the states are by and large quite restrictive about admitting out-of-state lawyers so that they can confidently carry on in-state law practice. The reasons given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers—those who make the in-state rules on local practice—by competition with out-of-state lawyers. Most of the justifications assert, somewhat implausibly, that the process of local admission is necessary to assure competence to deal with issues of local law and to enable local bar disciplinary agencies and courts to discipline the lawyer in the event of misconduct.[38] In short, the claimed motivation is consumer protection: Clients would otherwise suffer significant losses through incompetence and misconduct of out-of-state lawyers.

Leaving our puzzled alien to ponder our strange legal habits, this may be a good point to further consider the process of gaining the correct credentials to practice out-of-state. At the outset, it is important to underscore that full admission to practice is the only alternative to "going bare"—not being admitted at all. It is of fundamental importance that there is no transactional equivalent of what apparently every state accepts in the case of lawyering in litigation—admission *pro hac vice*.[39] In transactions, by contrast, there is no suit pending in court and thus no means by which the transactional lawyer can gain admission to a court.[40] *Pro hac vice* appearance is the subject of another paper in this Symposium.[41] Thus, for transactional lawyers, the only choices are either no admission at all or admission to practice that carries with it all of the privileges and the same indefinite duration of such privileges as are extended on the admission of in-state lawyers.

37. *See* Laws. Man. on Prof. Conduct (ABA/BNA) No. 103, at 21:2002 (Apr. 24, 1991). The reciprocal is not true; a lawyer admitted in Texas cannot be admitted on-motion in California. *Id.*; *see also infra* notes 43–45 and accompanying text.

38. *E.g.*, State v. Ross, 304 N.E.2d 396, 400 (Ohio Ct. App. 1973) (courts of every jurisdiction must have control of practice before them to maintain standards of professional conduct).

39. *See* WOLFRAM, *supra* note 1, § 15.4.3.

40. On the theoretical possibility of the transactional equivalent of *pro hac vice* appearance, *see infra* notes 117–19 and accompanying text.

41. Edward A. Carr and Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859 (1995).

1. "Regular" Admission Through Examination

There are two basic ways of gaining additional admissions to practice out of state. However, very few lawyers go through the entirety of either process.[42] One is to sit for the state's bar examination, leaping through and over all the hoops and barrels strewn in the way of a neophyte seeking first-time admission. Not surprisingly, only a very small number of already-admitted lawyers attempt that feat. The amount of time that would be required to study for the bar of the additional state simply makes it economically prohibitive to consider that course. I also suspect many established lawyers long out of law school have justifiable concern that, even if they take off three or four months to cram for the bar, the artificial exam-taking skill they once possessed as students has so atrophied that they are less able to pass a bar examination than they were immediately after graduation. For many lawyers, their aversion to the risk of professional embarrassment from failing even an additional bar has probably increased since law school. While one would be mortified to fail a bar exam immediately on graduation from law school, the professional insult would be magnified where the lawyer is already admitted to practice. Failure would suggest that the lawyer has been practicing incompetently all along.

2. Admission On-Motion

Therefore, most lawyers eschew what we will call "regular" admission and, if they consider admission at all, will think only of non-examination admission—or, as it is sometimes called "admission on-motion" or, more rarely, "reciprocity admission." That consists of complying with the law of Texas, for example, that permits a lawyer admitted in another state to qualify to practice law in Texas by a reciprocity admission process that is significantly less daunting than taking a bar examination. The impediments to local admission vary a great deal from one state to another. But, in general, most lawyers find that

42. *See generally* WOLFRAM, *supra* note 1, § 15.4.1. My impression is that, of the relatively few lawyers who gain admission to the bar of another state, most do so as part of a permanent move to another jurisdiction and thus in a context irrelevant to our problem of out-of-state lawyering from one's home jurisdiction. Others, particularly young lawyers unsure of their eventual place of practice or those intending to practice in a state-line community, may also be motivated to obtain multiple licenses.

life is too short and their resources too limited to allow them to surmount even that lesser set of hurdles to out-of-state admission.[43]

The states differ markedly in the extent to which they make the process either accommodating or difficult. At one extreme of obstructive regulation is a sizable group of states that denies such admission altogether. Those states, led by California, are situated primarily in the Sunbelt. Many speculate that the strict stance taken by those states is perhaps motivated by the concern of lawyers who already practice there. Concern revolves around the perceived threat of the invading Snowbelt lawyers who retire to balmier climates and increase competition for local law business with the unfair economic cushion of Social Security and other retirement capital. In those states, the only way of gaining admission to practice is through undergoing the arduous, "regular" process of sitting for the state's bar examination, submitting to a character-and-fitness examination, and the rest of the requirements for first-time admission. A different economic rationale probably motivates New Jersey, which also steadfastly refuses to authorize on-motion admission to the state bar.[44] Although scarcely a sunbelt state, New Jersey's lawyers practice under the cloud cast by the nearby horde of New York lawyers. We might refer to this as the tsunami factor—fear of inundation by a tidal wave of lawyers from an immediately adjoining jurisdiction with a vast number of lawyers. Driven by this array of motivations, California, Florida, Arizona, New Jersey, and twenty-two other states[45] are found in this first, most-restrictive group.

A bare majority of states *do* permit out-of-state lawyers to be admitted "on-motion."[46] Why, then, don't more lawyers belong to multiple bars? Local admission, where available, would eliminate any question of the legitimacy of practice in any such state. The answer is that even a comparatively more generous system is often tightly restricted and made less than optimal. For one thing, many of the "on-motion" states provide for what can only be described as retaliation, or as they would probably prefer to call it, limited reciprocity: The

43. For general surveys of the array of requirements for on-motion admission see generally WOLFRAM, *supra* note 1, § 15.4.1–15.4.2 at 865–71; Brakel & Loh, *supra* note 18, at 706–12.

44. *See* N.J. GEN. CT. R. 1:21–3 (1994) (on-motion appearances limited to legal-services and similar non-profit representations, and then only for limited period).

45. *See* Laws. Man. Prof. Conduct (ABA/BNA) No. 103, at 21:2002 (Apr. 24, 1991). Also among the restrictive jurisdictions are Guam, Puerto Rico, and the Virgin Islands. A sub-group of eight states (including California) provide out-of-state lawyers the option of taking a shorter bar examination focusing on local issues. *Id.*

46. *Id.*

state will admit a lawyer on-motion who is admitted in another state only if that other state would extend the same privilege to lawyers admitted in the on-motion state.[47] As a result, the solution of on-motion admission in such states is denied to the vast number of lawyers from California and the many other states denying on-motion admission to their own bars. Wisconsin assures that on-motion admission will be optimally onerous by imposing its own requirements and then adding what can only be described as a retaliatory kicker: The applicant must also satisfy whatever further restrictions would be applied by the state of original admission to a Wisconsin on-motion applicant there.[48] West Virginia requires that the admission-state have educational requirements that match its own, thus denying on-motion admission to lawyers admitted in California—regardless of where they actually were educated—which, among a small number of states, permits lawyers from non-accredited law schools to be admitted.[49] Most onerous for lawyers who frequently move from state to state is a requirement found in many on-motion states establishing a minimum number of years during which the out-of-state applicant must have practiced law in a single jurisdiction of original admission.[50]

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47. *See, e.g.*, Hawkins v. Moss, 503 F.2d 1171, 1180–81 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975) (constitutional for South Carolina to refuse reciprocity-admission to lawyer from New Jersey where on-motion admission is unavailable to South Carolina-admitted lawyer); Goldsmith v. Pringle, 399 F. Supp. 620, 628 (D. Colo. 1975) (constitutional for Colorado to refuse to extend otherwise available reciprocity admission to lawyer admitted in California and Florida, neither of which states permit on-motion admission).

For a debate on the constitutionality of retaliatory-reciprocity regulations in multistate lawyering, compare Jonathon B. Chase, *Does Professional Licensing Conditioned Upon Mutual Reciprocity Violate the Commerce Clause?*, 10 VT. L. REV. 223 (1985) (such restrictions on admission are unconstitutional) with Donald H. Berman, *Precedential Defilade: A Reply to Dean Chase*, 10 VT. L. REV. 247 (1985) (critiquing Dean Chase's analysis).

48. *In re* Saretsky, 506 N.W.2d 151, 152 (Wis. 1993) (lawyer seeking admission on-motion from Michigan must show maintenance of office in Wisconsin, because Michigan would require that of Wisconsin on-motion applicant to Michigan courts).

49. Lane v. West Virginia State Bd. of Law Examiners, 295 S.E.2d 670, 674 (W. Va. 1982).

50. *E.g.*, D.C. CT. APPS. R. 49 (attorney required to practice for five years before on-motion admission will be allowed); Lowrie v. Goldenhersh, 716 F.2d 401, 409 (7th Cir. 1983) (Illinois rule permitting admission without examination only if lawyer resided and practiced law in admitting state five of seven years preceding application not in violation of equal protection when applied to lawyer employed in Illinois by federal government and practiced in licensing state only two years). The operation of the admitting-state practice rules can create rather horrendous Catch-22 situations. In one such instance, which is too convoluted to describe succinctly, the Wisconsin court exercised discretion to waive the strictures of the rule. *In re* Wescoe, 478 N.W.2d 841, 843 (Wis. 1992).

As with many other of the on-motion requirements, jurisdictions vary over a considerable range in the degree to which the prior-practice requirement is interpreted to require full-time engagement in practice. *Compare In re* Golia-Paladin, 393 S.E.2d 799, 801 (N.C.

Beyond such threshold restrictions, most on-motion states add conditions for continuing one's on-motion membership that are often more onerous than those imposed on "regular" admittees. Indiana's warm embrace is more like a bear hug. Anyone applying for admission by motion faces a "predominant-practice" requirement—every such admitted lawyer must practice predominantly in Indiana or risk losing her Indiana license.[51] No similar requirement applies to lawyers who gain admission through the more arduous process of examination. Hence the rather apparent equal-protection challenge, which the Seventh Circuit was able to deflect by divining—as creative courts almost always can divine—a "rational state interest" minimally justifying the difference.[52] Only slightly less restrictive is a requirement found in several jurisdictions that every lawyer admitted to the state's bar on-motion must maintain an office in the state. This requirement is also rarely imposed on regular admittees.[53] A requirement formerly found in Virginia and several other states requiring that an on-motion applicant be a resident of the state to whose bar admission is sought was declared unconstitutional by the Supreme Court.[54] Subsequent

1990) ("active and substantial practice of the law" requires much more than occasional law practice shown by on-motion applicant) *with In re* Baker, 579 A.2d 676, 680–81 (D.C. 1990) (on-motion admission requires that applicant has been an active member in good standing of admitting-state's bar, without regard to whether applicant actually practiced law); *In re* Bingham, 562 So. 2d 341, 342 (Fla. 1990) (service as California juvenile traffic hearing officer considered "practice of law" for purposes of on-motion admission in Florida). *Cf.* Attorney Grievance Comm'n v. Keehan, 533 A.2d 278, 282 (Md. 1987) (disbarment of lawyer admitted on-motion for misrepresentation in failing to disclose that Pennsylvania practice was limited to fifteen hours per week and that applicant also held full-time position as insurance adjuster; omission was material in view of on-motion requirement that practice be principal means of earning livelihood).

51. *See* Scariano v. Justices of the Supreme Court, 38 F.3d 920, 925–29 (7th Cir. 1994) (Indiana's "predominant practice" rule for admission on-motion is not unconstitutional as violation of Equal Protection Clause or as violation of dormant Commerce Clause).

52. When the Supreme Court struck down the Virginia residency requirement for on-motion admission in Supreme Court of Va. v. Friedman, 487 U.S. 59, 64–70 (1988), it left undisturbed the Virginia requirement that the applicant also practice full-time in the state. *Id.* In fact, the Court noted the full-time practice rule on several occasions without any remark. *E.g.*, *id.* at 62, 68, 69–70 (quoting Virginia rule).

53. The way in which the local office requirement is interpreted and enforced varies widely among jurisdictions. According to one New York decision, for example, the required local office can be a mere mail drop and answering service. *See* Austria v. Shaw, 542 N.Y.S.2d 505, 506 (N.Y. Sup. Ct. 1989). *But see, e.g., In re* Arthur, 415 N.W.2d 168, 170 (Iowa 1987) (rejecting "bricks and mortar" approach urged by applicant, court requires personal presence conducting law business for substantial and scheduled portion of lawyer's time); *In re* Sackman, 448 A.2d 1014, 1016–17 (N.J. 1982) (out-of-state lawyers must maintain "bona fide office" in state to continue membership in state's bar).

54. Supreme Court of Va. v. Friedman, 487 U.S. 59 (1987); *see also* Sommermeyer v. Supreme Court of Wyoming, 871 F.2d 111, 112 (10th Cir. 1989) (Wyoming on-motion requirement of state residence is unconstitutional under *Friedman*).

decisions, however, have indicated that a similar rationale does not apply to a state office requirement. Nonetheless, the Supreme Court has exercised its supervisory power to refuse to permit lower federal courts to require a local office as a condition of on-motion admission to the bar of a local federal court on the ground that such a requirement is irrational.[55]

Even if the barriers to on-motion admission can be overcome, the burdens of ongoing membership in another bar that apply equally to all lawyers are themselves not insignificant. Most states have mandatory bars[56] or, at the very least, local registration requirements[57] necessitating a sizable payment of dues or other fees each year for the honor of being a local bar member. Significant other exactions, such as a contribution to replenish the jurisdiction's client security fund, may be added to membership fees.[58] Adding another state's admission privilege always carries with it significant paperwork and membership fees. Local membership may carry other burdens. Florida, for example, imposes a mandatory *pro bono* requirement from which out-of-state lawyers admitted in Florida are not exempt.[59] Requirements for continuing legal education in an on-motion state may also be more onerous than one's home jurisdiction. And, although few lawyers, until recently, were probably aware of the possibility, the addition of another state's bar membership portends complications in any future proceeding in which questions arise about which state's disciplinary (and other) rules apply with respect to lawyer conduct regulated differently in different jurisdictions.[60]

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55. Frazier v. Heebe, 482 U.S. 641, 645–51 (1987). It does not follow, of course, that a state requirement is unconstitutional, nor even that it is subject to the same criticism of irrationality. The gap between federal-court practice and a local office is considerably less defensible than that between state practice and a state office requirement, although the latter is misguided.

56. The curious term more often employed to describe a mandatory bar is "integrated." The term has nothing to do with racial, ethnic or gender mixing, but refers to a requirement that a lawyer belong to the bar association and pay annual dues as a condition of the right to practice law in the jurisdiction. *See* WOLFRAM, *supra* note 1, § 2.3 at 36–38.

57. WOLFRAM, *supra* note 1, § 2.3 at 38.

58. *Cf. In re* Smith, 370 S.E.2d 876, 877–78 (S.C. 1988) (local lawyer's suspension can be extended for practicing law while attorney was already under automatic suspension for failure to pay bar dues and client security fund assessment).

59. *See In re* Amendments to Rules Regulating the Florida Bar, 630 So. 2d 501, 505 (Fla. 1993) (lawyers admitted in Florida who reside and practice out-of-state are nonetheless required to comply with serve-or-pay obligations under Florida mandatory *pro bono* system).

60. At an earlier time when lawyer discipline was administered only infrequently and primarily for blatant misconduct, no disciplinary significance attached to possible choice of law questions in interstate law practice. In any event, there was little state-to-state varia-

I'm not aware of a serious study attempting to quantify the cumulative impact of those additional burdens imposed by admission-on-motion bar membership. Nonetheless, lawyers at least seem to share, almost universally, the impression that on-motion admission is a significant burden that a lawyer should avoid if possible. Yet, as is familiar, cost avoidance almost inevitably carries risk.

F. Remedial Consequences of Unauthorized Interstate Practice

1. Remedies Against Unlicensed Lawyers

What, then, is the risk to a lawyer of unauthorized multistate transactional law practice? My first point is this: The sneaking around to which I refer in the title of my remarks is the widespread separation between what seems to be required by the wording of the disciplinary prohibition against unauthorized "practice of law" in other jurisdictions and what is actually occurring every day in practice. A very large, yet undetermined number of lawyers are flouting at least the literal terms of the "thou shalt not" of the professional codes.[61] In fact, many transactional lawyers often—some habitually—practice

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tion in the vague and quite general rules applicable to lawyers for most of this century. It was only with the dissolution of uniformity stemming from the adoption of the 1983 ABA Model Rules of Professional Conduct, and particularly from the post-1983 amendments to that decreasingly "model" set of rules, that significant disparity in state regulation has arisen. The ABA itself recognizes the problem, which probably would have arisen even if the 1983 Model Rules had not been written. In August 1993, the ABA adopted a revised Model Rule 8.5, providing a recommended structure for determining which state's discipline law should apply in a multijurisdictional discipline situation. For three diverging views of the wisdom of what the ABA has wrought, compare Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907 (1995) (supporting amendment to ABA Rule 8.5) with Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715 (1995) (rejecting ABA solution and opting, instead, for client-state-of-residence presumptive rule) with Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799 (1995) (rejecting proposed ABA solution, but opting for giving presumptive effect to choice of law clause in lawyer-client contracts).

61. For similar, and similarly impressionistic estimates, see James P. Schaller, *Are You Engaging in the Unauthorized Practice of Law?*, D.C. B. REP., February/March, 1994, at 3, col. 1 (chair of D.C. bar committee to revise local court rule governing law practice estimates that number of local unauthorized practitioners is "legion"). *See also Full Admissions Reciprocity Is In-House Lawyers Goal*, 9 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 352 (1993):

> Vigorous clapping greeted suggestions made at the annual meeting of the American Corporate Counsel Association that there should be a uniform bar admissions test that would serve to ensure reciprocity among all the states. Perhaps this reaction wasn't surprising, considering the large show of hands when members of the audience were asked how many of them are not currently licensed to practice law in the jurisdiction in which they are located. . . . "If there's one single issue we

law in jurisdictions in which they are not admitted. Yet, professional discipline for out-of-state unauthorized practice is minimal, at least in the non-banal instances that I will chiefly concentrate upon. Those instances are mainly of a familiar type of enforcement of otherwise under-enforced disciplinary offenses—where either the charge specifies blatant unauthorized practice elsewhere,[62] or it is only one among many other charges and the other violations are themselves blatant and fully sufficient to account for the discipline.[63] Application of Occam's razor suggests that, standing alone, unauthorized practice out-of-state by an in-state lawyer may not be considered sufficiently noteworthy to excite prosecution efforts from disciplinary authorities in the lawyer's home jurisdiction. The reason for that should be clear: The thrust of the unauthorized practice prohibition, to the extent it is directed against lawyers, is directed mainly at lawyers from *other* jurisdictions who are not locally admitted. Lawyers from those distant jurisdictions are, as a matter of fundamental—if self-imposed—limitation on the competence of the local disciplinary agencies, beyond the disciplinary jurisdiction.[64] Lawyers from the *same* jurisdic-

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get more phone calls on at [ACCA] headquarters, it's this one," Frederick J. Krebs, executive director of ACCA, told attendees at a Nov. 12 panel.

Id. On the distinguishable situation of house counsel, see *infra* notes 143–45.

62. One of the very few instances of discipline for unauthorized practice elsewhere is *In re Kennedy*, 605 A.2d 600 (D.C. 1992). The case is, however, unusual. Kennedy had earlier been the subject of a published Maryland decision detailing his blatant violation, including opening a permanent law office in Maryland although not admitted there. *See* Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200 (Md. 1989). Kennedy was a repeat offender in D.C. *Id.* at 202–06. It may also have been significant that D.C. bar officials are themselves keen to root out out-of-state practitioners in D.C., and may have wished to appear even-handed in enforcing the prohibition against non-locals and locals alike. *See infra* note 64.

63. *E.g., In re* Carter, 426 S.E.2d 897, 898–99 (Ga. 1993) (attorney disciplined for representing divorce client in Alabama proceeding without being admitted to practice there; in addition to neglecting that matter, attorney misrepresented status of matter to client, withdrew without notifying or taking steps to protect client, failed to refund any portion of fee, and failed to respond to disciplinary complaint as required). *Cf. In re* Ellis, 504 N.W.2d 559 (N.D. 1993) (ordering suspension of lawyer who was admitted only in North Dakota and permissibly filed suit in Minnesota without associating local counsel, where custom was to permit such unless opposing party objected; however, lawyer committed disciplinary offense by abandoning client when defendant objected).

64. The concept of jurisdiction-to-discipline that has emerged in this century is curious. It has taken its form primarily from concepts of administrative law, which is itself a recent invention. In most states, the basis on which disciplinary jurisdiction attaches is not the presence of the lawyer in the jurisdiction or the doing of some act there sufficient to confer adjudicatory jurisdiction. Instead, the "hook" is local bar admission. At least in form, the central question in bar-discipline proceedings is whether the lawyer respondent should retain the privileges of local admission. In fact, many other sanctions are possible, including some that have direct monetary consequences, such as orders requiring restitution. *See, e.g., In re* Brown, 854 P.2d 768, 772 (Ariz. 1993) (ordering restitution along with

tion—locally admitted lawyers—who might transgress the unauthorized practice restrictions of a foreign state, even if contiguous, are considered beneath disciplinary notice. The reasons for that prosecutorial stance of forbearance are intuitively obvious, although theoretically somewhat more complex.[65]

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a period of suspension); Chasteen v. State Bar, 709 P.2d 861, 864–65 (Cal. 1985) (en banc) (suspension was warranted for stated period, with restoration to practice subject to probation conditioned on paying restitution to client). Sanctions also may include orders requiring a disciplined lawyer to pay the costs of the proceeding. *See, e.g., In re* Ellis, 504 N.W.2d 559, 565 (N.D. 1993) (suspended lawyer ordered to pay costs and attorney fees); Office of Disciplinary Counsel v. Jackson, 637 A.2d 615, 619 (Pa. 1994) (lawyer disbarred and ordered to pay costs of investigation and prosecution of matter). But those other sanctions all hinge on local bar membership.

This is hardly a necessary arrangement. Departing from the historical approach, at least one jurisdiction that has aggressively regulated local unauthorized practice by out-of-state lawyers has resorted to formal nondisciplinary remedies that bear close resemblance to bar discipline. *See* Brookens v. Committee on Unauthorized Prac. of Law, 538 A.2d 1120 (D.C. 1988) (out-of-state lawyer could be required to answer, in non-jury proceeding before D.C. unauthorized-practice committee, to charge of unauthorized practice within jurisdiction, punishable by contempt sanction not involving imprisonment). In addition, California's lawyer code claims that it applies both to members of the state bar by virtue of that membership regardless of where they act, as well as to non-member lawyers from other jurisdictions with respect to lawyer functions performed in California, "but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law." *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-100(D)(1)(2) (1992). A similar jurisdictional reach is recommended in the ABA's MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 6(A) (1993) (lawyers subject to state's lawyer-discipline jurisdiction include "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state"). The McKay Report, *supra* note 29, at 101, mentions Rule 6(A), but only as atypical. "[M]ost other jurisdictions do not assume discipline jurisdiction over lawyers performing legal services within their borders unless the lawyers have been regularly or specially admitted." *Id.* No mention is made of the strange nature and consequences of this self-imposed limitation. *Id.*

65. Even a jurisdiction with a strict prohibition against unauthorized practice by out-of-state lawyers may be under-motivated to enforce its ethical prohibition against its own lawyers' unauthorized practice in *other* jurisdictions. Such a prosecution would be remarkably altruistic since it would seek to protect only the interests of the other jurisdiction by excluding the disciplinary jurisdiction's lawyers from competition. Such prosecution could also be defended on the ground that the unauthorized practice demonstrates insufficient regard for legal obligations, although that analysis would hardly differentiate the offense in question from all others. Disciplinary agencies clearly make choices about which offenses to pursue. One could, unrealistically, regard a state's prohibition on extra-jurisdictional unauthorized practice as part of a nation-wide arrangement for regulating law practice out of instincts of mutuality. Under this supposed nationwide arrangement, each jurisdiction would agree to discipline its own lawyers who violate the province of other states in order to motivate other states to do the same with their own lawyers. The possibility under such an arrangement for what economists and game theorists call free-loading is, of course, obvious.

In the end, one might expect a jurisdiction to be much more aggressive in prosecuting out-of-state unauthorized practitioners—through non-disciplinary proceedings, such as contempt or criminal prosecution—than a neighboring jurisdiction would be in prosecuting

To be sure, there are instances of vigorous application of the disciplinary rules, but only in the instances that do not interest us here. Such instances, given the current and doubtless continuing state of the law, are indeed banal. For example, a lawyer may not practice law in any jurisdiction if, despite having earned the sobriquet of "lawyer" by some stretch or at some place and time, the person is not currently a lawyer in good standing[66] in *any* jurisdiction. That is true of disbarred lawyers, those suspended from practice,[67] lawyers who have failed to complete law school,[68] lawyers who have not completed the process of passing the bar exam, or those who have not fulfilled the jurisdiction's character-and-fitness procedures,[69] and lawyers admitted only in a for-

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the forum's own exported and thus illegitimate practitioners. The rarity of such non-disciplinary prosecutions probably reflects a kind of tacit forbearance out of concern that a neighboring jurisdiction would retaliate by vigorously attacking that state's own lawyers.

66. An arguably different type is the lawyer who, although locally admitted to practice law for all general purposes, is nonetheless occupationally prohibited from practicing law. The common instance is a full-time judge, who is precluded, apparently in every state, from practicing law. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4(G) (1990) ("A judge shall not practice law."). Instances of discipline of such a lawyer are not unknown. *E.g.*, *In re* Bonafield, 383 A.2d 1143, 1144–45 (N.J. 1978) (disciplining lawyer who practiced law while serving as judge of compensation commission in violation of DR 3-101(B)). Other examples include court clerks and law-enforcement agents, who are also flatly prohibited from practicing law, and persons such as prosecutors and government lawyers, who are prohibited from private law practice. *See* WOLFRAM, *supra* note 1, § 15.1.4 at 849. Violations of the prohibition against law practice by such persons is more properly thought of as a violation of a specific practice restriction rather than as a violation of a general norm.

67. *E.g.*, Farnham v. State Bar, 552 P.2d 445, 449 (Cal. 1976) (impermissible for suspended lawyer to give legal advice and draft legally significant documents); State *ex rel.* Oklahoma Bar Ass'n v. Downing, 863 P.2d 1111, 1115 (Okla. 1993) (disbarring attorney for unauthorized practice while suspended); State v. Bucci, 430 A.2d 746, 746–47 (R.I. 1981) (criminal conviction of lawyer for unauthorized practice while under suspension); Carter v. Bucci, 442 A.2d 865 (R.I. 1982) (disbarring same lawyer following conviction); *In re* Easler, 272 S.E.2d 32 (S.C. 1982) (preparing, executing, and filing deed for another while suspended from practice constituted practice of law sufficient for contempt of court). In some circumstances, the divesting of the right to practice—turning further practice into unauthorized practice—can occur without any formal action. *See* Toledo Bar Ass'n v. Doyle, 623 N.E.2d 37 (Ohio 1993) (lawyer suspended indefinitely for continuing to practice law despite failing to renew his registration as in-state lawyer; such failure to register was apparently treated as automatic suspension of right to practice).

68. *E.g.*, Martha Middleton, *Firms Scramble to Check Credentials: The Two Lawyers Who Weren't*, NAT'L L.J., May 23, 1988, at 3 (two Chicago firms' unrelated discoveries of firm lawyers, one being partner, who had never become members of any bar because of their failures to complete law school graduation requirements).

69. *See* Lincoln Caplan, *The Jagged Edge*, A.B.A. J., March 1995, at 52 (court-martial of Marine Corps judge advocate who, following graduation from law school, forged California law license); Edward A. Adams, *Bar Gropes to Curb Unlicensed Lawyers*, N.Y. L.J., Dec. 21, 1989, at 1 (reporting resignations of lawyers from several prominent New York City firms who had never completed process of becoming admitted to practice).

eign country.[70] All such lawyers obviously commit unauthorized practice if they engage in the practice of law in any state. In the eyes of the law, such ersatz lawyers are treated, at best, as if they had never been legally trained or admitted anywhere.[71] I am aware of no statistics on such matters, but it is my impression that such unauthorized practitioners, once detected (for obvious reasons, they most often operate covertly), are enthusiastically rooted out by local bar authorities or prosecutors through injunction and/or contempt, criminal prosecution, or the like.[72]

Of course, such a lawyer, who is not a lawyer in the fullest sense, is self-positioned to be immune from the remedy of professional discipline, at least for the moment. Immunity stems from the fact that only lawyers locally admitted are subject to professional discipline in a jurisdiction.[73] However, such unauthorized practitioners—to the extent

70. *E.g.*, *In re* Roel, 144 N.E.2d 24, 27 (N.Y. 1957) (Mexican lawyer not admitted in New York who practiced exclusively Mexican divorce law in New York held in criminal contempt), *appeal dismissed*, 335 U.S. 604 (1958). More recently, New York and a growing number of states with important international trade interests have passed legislation permitting foreign-trained lawyers to practice in the jurisdiction as foreign-law consultants. *See generally* Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 469–73 (1989) (action of New York and other states motivated by need to satisfy French reciprocity rule that threatened Paris and Strasbourg branch-office practices of U.S. law firms). In 1993, the ABA adopted a Model Rule for the Licensing of Foreign Legal Consultants. *See ABA Adopts Several New Rules*, 9 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 235, 236 (1993). More is at stake than broad-minded internationalism. In 1992, according to the U.S. Commerce Department, American firms collected $1.4 billion in fees from foreign clients. *See* Gary Taylor, *U.S. Firms Are Export Machines: Sale of Legal Services Abroad Soars in '90s*, NAT'L L.J., May 30, 1994, at A6, col. 4. Idealism may explain part of the history of the foreign-consultant legislation. At least in *In re Roel*, the court indicated that the Association of the Bar of the City of New York first urged legislation admitting foreign-law consultants in 1924. *In re Roel*, 144 N.E.2d at 27–28.

71. *E.g.*, *In re* Burrell, 882 P.2d 1257, 1261 (Alaska 1994) (revoking probation of suspended lawyer who continued to practice law while under disciplinary suspension); Florida Bar v. Neckman, 616 So. 2d 31, 32 (Fla. 1993) (unauthorized practice in continuing to practice law after resignation to avoid discipline is equivalent to violating prior disciplinary order of court); *In re* Kasdan, 623 A.2d 228, 233 (N.J. 1993) (lawyer's continuing practice following suspension in violation of court rule "guidelines" for suspended lawyers constituted violation of Rule 3.4(c), which prohibits disobedience of obligation under rules of tribunal).

72. On the deployment of such remedies for unauthorized practice by out-of-state lawyers, *see infra* notes 74–81 and accompanying text.

73. *See supra* note 65. On the other hand, most jurisdictions hold that a lawyer remains subject to professional discipline even if, at the time of the alleged offense or at the time proceedings are brought, the lawyer was suspended from practice. *E.g.*, *In re* Sawhill, 425 S.E.2d 274, 275–76 (Ga. 1993) (lawyer under suspension was nonetheless subject to disciplinary jurisdiction); Grievance Adm'r v. Attorney Discipline Bd., 522 N.W.2d 360,

they are concerned with remaining or once again becoming credentialed to practice law—can be subjected to at least three kinds of significant sanctions. First, if the lawyer was only temporarily suspended from practice, instances of unauthorized practice while suspended may be punished by an extension of the period of suspension or even by the sanction of permanent disbarment.[74] A shrinking number of states still have such a sanction.[75] Second, even if the disciplinary agency lacks competence to impose professional sanctions immediately upon an unauthorized practitioner because of the person's nonstatus as a lawyer, the force of such sanctions may merely be deferred until a later time when the offender applies to be admitted or re-admitted to practice. At that point, the applicant's prior unauthorized practice will be taken into account in assessing whether the person demonstrates, among other things, awareness of the responsibilities of lawyers. Unauthorized practice, reflecting a lack of such awareness, might preclude favorable action.[76] Third, in many jurisdictions unauthorized practice by any person, including a person imperfectly credentialed, constitutes a misdemeanor or a contempt of court. Therefore, in these jurisdictions a person may be subject to prosecution for contempt[77] or to an injunction proceeding.[78]

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360 (Mich. 1994) (revocation of lawyer's license does not place former lawyer beyond jurisdiction of state's disciplinary board).

74. *E.g.*, People v. Belfor, 611 P.2d 979 (Colo. 1980) (imposing additional suspension period of one year); *In re* Depew, 560 P.2d 886, 892 (Idaho 1977) (with other violations, unauthorized practice while under suspension warrants disbarment); *In re* Allper, 617 P.2d 982, 991–92 (Wash. 1980) (lawyer disbarred for, among other offenses, continuing to practice law while under suspension). Some types of sanctions seem particularly toothless. *E.g.*, Florida Bar v. Neckman, 616 So. 2d 31, 32 (Fla. 1993) (lawyer resigned from bar rather than face disciplinary charges but continued to practice subjected to public reprimand).

75. According to the McKay Report, *supra* note 29, at 123, only approximately six of the forty-nine jurisdictions on which it gathered data continued to provide for permanent disbarment.

76. *E.g.*, *In re* McConnel, 886 P.2d 471, 477 (Okla. 1994) (refusing to reinstate suspended lawyer who, while suspended, misrepresented status as practicing lawyer although not actually engaging in unauthorized practice); *In re* Kraus, 670 P.2d 1012, 1017 (Or. 1983) (denying reinstatement and prohibiting reapplication for reinstatement for further period because lawyer continued practice and failed to inform clients of suspension); Carter v. Peotrowski, 568 A.2d 1032, 1033 (R.I. 1990) (lawyer who engages in unauthorized practice after disbarment is not entitled to reinstatement). *See also In re* Blair, 614 A.2d 523, 528 (D.C. 1992) (where evidence was unclear whether lawyer applying to D.C. bar had, while suspended in another state, engaged in unauthorized practice, applicant refused admission; applicant was required to show by preponderance of evidence that he possessed good moral character).

77. *E.g.*, United States v. Kozel, 908 F.2d 205, 208 (7th Cir. 1990) (affirming finding of contempt, for violation of local rule prohibiting unauthorized practice, and imposition of sanctions in original proceeding in federal district court); State *ex rel.* Fla. Bar v. Sperry,

The fact that we are dealing with a myth that actually shapes disciplinary and judicial policy is sufficiently illustrated by the non-banal, and different, instance of unauthorized practice by the transactional lawyer who is fully admitted to practice in a state, but not in the state in which the lawyer happens to follow a client problem.

Generally, it is no different with such persons, who are lawyers in every sense of the word except for their lack of local admission. They have not been suspended or otherwise fallen short of meeting their jurisdiction's admission rule. However, their admission is a ticket allowing practice only in jurisdictions different from the one in which they are accused of unauthorized practice. Such lawyers are treated as if they were admitted nowhere or as if they had been disbarred for the most heinous disciplinary offense. In-state unauthorized practice may incur the same wrathful remedial vengeance through injunction[79] or directly through contempt[80] proceedings. Apparently, the most frequently imposed sanction is for in-state courts to deny a lawyer practicing without local authorization any right to recover fees from a client—in effect forfeiting the lawyer's otherwise sound claim for a fee as a sanction for the unauthorized practice.[81] On the other hand, the

140 So. 2d 587, 589 (Fla. 1962) (unauthorized practice of law constitutes contempt of court), *rev'd on other grounds*, 373 U.S. 379 (1963).

78. *E.g.*, Idaho State Bar v. Villegas, 879 P.2d 1124 (Idaho 1994) (unlicensed "public adjuster" enjoined from engaging in any activity involving determination of legal rights and responsibilities, giving legal advice or counsel, or preparing instruments by which legal rights are secured); State *ex rel.* Disciplinary Comm'n v. Owen, 486 N.E.2d 1012, 1012 (Ind. 1986) (permanent injunction against unauthorized practice by unlicensed person who operated public "legal research agency" and, in response to request for service by Indiana inmate on how to attack Indiana conviction, sent memorandum containing references to Michigan law); South Carolina Med. Malpractice Jt. Underwriting Ass'n v. Froelich, 377 S.E.2d 306, 308 (S.C. 1989) (injunction granted against in-state practice by personal injury lawyer admitted in Illinois but not locally); Unauthorized Prac. Comm. v. Cortez, 692 S.W.2d 47, 50 (Tex. 1985) (permanent injunction of trial court affirmed after determining as matter of law, notwithstanding contrary jury finding, that private immigration service constituted exercise of legal skill or knowledge).

79. *E.g.*, Unauthorized Prac. of Law Comm. v. Bodhaine, 738 P.2d 376, 377 (Colo. 1987) (injunction against lawyer admitted in another state from in-state unauthorized practice of law); Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 213 (Md. 1989) (affirming injunction against D.C.-admitted lawyer not admitted in Maryland, who publically held himself out as lawyer engaged in general practice of law in Maryland from principal office there).

80. *See* Brookens v. Committee on Unauthorized Prac. of Law, 538 A.2d 1120, 1124 (D.C. 1988) (affirming committee's entry of administrative order directing payment of fine by out-of-state lawyer for contempt for violating local rule limiting *pro hac vice* appearances in litigation to five per year).

81. *E.g.*, Martin & Martin v. Jones, 541 So. 2d 1, 1 (Ala. 1989) (lawyer not admitted to practice law in Alabama estopped from enforcing client's promise to pay fee for lawyer's legal services in state; also precluding lawyer from recovery on theory of unjust enrich-

burdens of local law, such as the extension of long-arm jurisdiction to such a practitioner, will, of course, be readily imposed.[82]

While no statistics are apparently available, an admittedly anecdotal impression gained from years of scanning the regional reporters indicates that vigilance attends the efforts of many jurisdictions to assure that such rogue half-lawyers from out-of-state are deterred or punished. As with instances of unauthorized practice by "pure" nonlawyers, so here it is no defense that the lawyer is brilliantly prepared to practice law; the offense of unauthorized practice is sufficiently demonstrated by failure to comply meticulously with the requirements of local admission. That, then, would seem a key part of the mythology of law compliance by multistate transactional practitioners: the creation of the appearance that lawyers who are not fully credentialed to practice will be dealt with certainly and severely, notwithstanding that the actual legal work performed might have been flawless.

2. *Consequences for Clients: The "No Nullity" Rule*

A striking feature of the law concerning unauthorized practice by lawyers is that the remedial effects on the client of an unauthorized practitioner are minimal. At least, one can imagine a much more robust set of consequences. In general, the remedies provided are personal to the offending practitioner and do not directly affect clients of the practitioner, including those clients who may have been fully aware of the lawyer's failure to gain admission in the state in which services were provided.

One is tempted to conclude that the client is no worse off, and better off in one principal respect—non-liability for fees—than a client whose lawyer is fully admitted locally. All significant aspects of a client-lawyer relationship involving a fully credentialed lawyer also apply to a relationship between a client and an unauthorized lawyer. It seems universally acknowledged today that the attorney-client privilege applies to their communications to the same extent as if the law-

ment); Perlah v. S.E.I Corp. 612 A.2d 806, 808 (Conn. Cir. Ct. 1992) (lawyer admitted only in New York precluded from collecting fees for representing Connecticut client through unauthorized practice in Connecticut, even though admitted to practice in Connecticut midway through representation). Similarly, courts will refuse to honor otherwise valid attorney liens of an unauthorized out-of-state lawyer. *E.g.*, McRae v. Sawyer, 473 So. 2d 1006, 1009 (Ala. 1985).

82. *E.g.*, Clark v. Milam, 830 F. Supp. 316, 322 (S.D. W. Va. 1993) (in-state activities of out-of-state lawyer who conducted nine-year administrative proceeding established sufficient minimum contacts with state).

yer were fully admitted.[83] Perhaps more importantly from the client's perspective, the generally prevailing judicial view is that action taken by the lawyer on behalf of the client is not rendered nugatory due to the defect in the lawyer's credentialing, although a lawyer who engages in unauthorized practice may suffer a personal sanction.[84] Thus, when a court filing date is critical in complying with time-bound procedural rules, the filing is not void when signed by an unauthorized-practitioner lawyer.[85] Sensibly enough, the not-a-nullity position is even more uniformly followed when it is the client who attempts to nullify the legal effect of a lawyer's in-state activities on the ground that they are unauthorized.[86]

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83. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122(2) & cmt. e (Tentative Draft No. 2, 1989) (attorney-client privilege applies to client's communications with his or her lawyer or with person whom client reasonably believes to be such). The Restatement follows the predominant position of the evidence codes and the decisions in defining "lawyer" broadly to include a person admitted to practice law anywhere. *E.g.*, Mitts & Merrill, Inc. v. Shred Pax Corp., 112 F.R.D. 349, 352 (N.D. Ill. 1986) (communications with German patent agent to be privileged). The Supreme Court Rules Advisory Committee justified that approach, among other considerations, on the ground that it avoids choice of law problems that otherwise would arise concerning the scope of a lawyer's authority to function as a lawyer in a multistate practice context. *See* Supreme Court Advisory Committee Note on Evidence Rule 502(a)(2), 56 F.R.D. 183, 238 (1972).

84. *See, e.g.*, Practice Management Ass'n, Inc. v. Walding, 138 F.R.D. 148, 149 (M.D. Fla. 1991) (violation of local rule requiring pleader's lawyer to be admitted locally did not warrant striking pleading, but lawyer was required, among other things, to reimburse opponent for expenses of bringing matter to court's attention).

85. *See, e.g.*, Daewoo Elec. Co. v. United States, 655 F. Supp. 508, 512 (Ct. Int'l Trade 1987) (summons challenging Commerce Department antidumping determination not defective because signed by lawyer not admitted to court); White v. Katz, 619 A.2d 683, 688 (N.J. Super. Ct. App. Div. 1993) (date of filing complaint signed by non-admitted, out-of-state lawyer satisfied statute of limitations); People v. Carter, 566 N.E.2d 119, 122 (N.Y. 1990) (status of prosecutor, who practiced law for sixteen years without being admitted to bar, did not taint grand jury proceeding so as to require dismissal of prosecution). *But see, e.g.*, Fruin v. Northwestern Med. Faculty Found., Inc., 551 N.E.2d 1010, 1011 (Ill. App. Ct. 1990) (trial court properly dismissed with prejudice pleading signed by unauthorized out-of-state practitioner, where locally-admitted lawyer did not enter appearance until after running of statute of limitations). Some decisions enforcing a nullity rule involve mere wrist-slapping for the client. *See, e.g.*, Commercial Credit & Control Data Corp. v. Wheeler, 756 S.W.2d 769, 770–71 (Tex. App.—Corpus Christi 1988, writ denied) (ordering brief of appellee, signed only by out-of-state lawyer not properly admitted, to be stricken from court's records, but then affirming judgment despite pretended absence of successful party's brief).

86. *See, e.g.*, Schifrin v. Chenille Mfg. Co., 117 F.2d 92, 95 (2d Cir. 1941) (lawyer for defendants who signed stipulation consenting to interlocutory judgment was not admitted in district did not provide basis for defendant's attack on stipulation); Wilbourn v. Mostek Corp., 537 F. Supp. 302, 304 n.1 (D. Colo. 1982) (client could not deny that lawyer, admitted only in Texas and not Colorado, was practicing law in Colorado as agent of client when he represented client in contract negotiations and closing there and thus submitted client to long-arm jurisdiction).

G. Existing Decisional Law Defining Unauthorized Interstate Practice

Against this backdrop of assumed widespread lawyer indifference to the apparently broad prohibition against unauthorized interstate lawyering, it is time to turn to the decisions attempting to define that doctrine. What we see are very few decisions, a fair amount of pointless rigor in applying the prohibition against unlicensed local law practice, and an apparently high level of judicial confusion over how to delineate permissible and impermissible practice.

Perhaps the most notorious of those decisions is that of the New York Court of Appeals in *Spivak v. Sachs*.[87] Mary Sachs, who lived in New York City with her two children, found herself the defendant in a divorce action that her husband, represented by the well-known New York City firm of Sullivan & Cromwell, had filed in Connecticut. Things went poorly, despite the efforts of her New York and Connecticut lawyers. After her husband gained custody of one of the children, she was pressed to accept what she considered a poor property settlement and was confused about what to do. Spivak practiced law in California,[88] where he was admitted, and had met the Sachses socially there, as well as in New York and Connecticut. Presumably from those associations, Mary Sachs called Spivak in California and, in three phone calls, prevailed upon him to come to New York to advise her. Spivak told her that he was not a member of the New York bar and that the most he could do was advise her and recommend other New York lawyers. Spivak flew to New York City and spent fourteen days there on Mary Sachs' case. He reviewed drafts of settlement agreements proposed by her Connecticut lawyer and discussed with her various financial arrangements and custody questions. Spivak then gave his opinion based on, among other things, what he knew of New York law, that the proposed property settlement was inadequate and that she was not being adequately represented. Later, Mary Sachs arranged for Spivak to meet her New York lawyer, and Spivak told him that Connecticut was not the proper jurisdiction for the divorce action.[89] After several meetings with the New York lawyer, Spi-

87. 211 N.E.2d 329 (N.Y. 1965) (4-3 decision).

88. *Id.* at 329. At least one California decision has shown a much more accommodating attitude than that shown in *Spivak* on facts very similar to it. Cowen v. Calabrese, 41 Cal. Rptr. 441, 443 (Cal. Dist. Ct. App. 1964) (Illinois lawyer who came to California to advise client residing there could recover fees for advice in federal bankruptcy matter).

89. Given the description of Mary Sachs as a "New York resident," Spivak's advice on the absence of jurisdiction to divorce in Connecticut seems suspiciously sound. *Spivak*, 211 N.E.2d at 330.

vak unsuccessfully urged her to fire the New York lawyer and retain one recommended by Spivak.[90] When she subsequently refused to pay his bill, Spivak sued, only to have New York's highest court deny him relief on the ground that his activities in New York constituted the unauthorized practice of law.[91]

The glimmer of rationality in the New York decision is that the tenor of the majority opinion seems directed as much at Spivak's gall in asking Mary Sachs to fire a New York lawyer based on his own reading of New York law, rather than on a general notion that an out-of-state lawyer literally may not provide advice or other legal services in New York under any circumstances. The opinion at least went to the trouble of offering the following, somewhat Delphic solace:

> There is, of course, a danger that [the statutory prohibition against unauthorized practice] could under other circumstances be stretched to outlaw customary and innocuous practices. . . . [R]ecognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely unlike the present one.[92]

How would they be different? Is *Spivak* indeed to be read as a case of lawyer manners—requiring only a higher degree of deference to New York lawyers, regardless of the merits, so that Spivak would have received his fee if he had not urged his client to replace her New York counsel?; or if he had been less insistent on his view of New York law? Is two weeks too long a time to spend in New York City? Is advice connected to litigation to be treated differently than advice more purely transactional in nature? Notably, the court concedes that it was not fatal that Spivak dealt with a New York client or that the transaction was tied to New York. But beyond that one can only guess at what facts nonetheless triggered the court's hostility.

The New York Court of Appeals has since had a chance to correct the overstated ground of decision in *Spivak*, but unfortunately

90. *Id.* Much is left unstated in all of the *Spivak* opinions, including the upshot of Mary Sachs' plight and whether Spivak's advice was sound. The dissent in the New York Supreme Court Appellate Division opinion quotes from Spivak's trial testimony, which indicates that Mary Sachs did not prevail. *See* Spivak v. Sachs, 250 N.Y.S.2d 666, 669 (N.Y. App. Div. 1964) (Eager, J., dissenting) ("'There is only one element [in a favorable appraisal of his fee claim] that is missing . . . that is the result obtained, and had I been permitted to continue I think we would have had a favorable result.'").

91. *Spivak*, 211 N.E.2d at 329–30.

92. *Id.* at 331.

failed to do so.[93] The more recent decision seems entirely correct, although based on facts rather similar to those in *Spivak*. At the very least, the court in *Seaman* reads the earlier precedent to have recognized an exception for "incidental and innocuous" practice in New York by an out-of-state lawyer.[94] Unfortunately, and given the facts in *Spivak*, that standard says very little about where New York courts might draw the line in the future.[95]

Spivak is typical of restrictive cases in placing its emphasis on the dangers posed by unauthorized practitioners because of their lack of knowledge of local law and the absence of a basis for imposing professional discipline on them, because they are not local bar members.[96]

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93. El Gemayel v. Seaman, 533 N.E.2d 245, 248–49 (N.Y. 1988) (Lebanese lawyer who, by calling and writing from District of Columbia and Massachusetts, gave New York client advice about the enforceability of Massachusetts custody decree in Lebanese court did not engage in unauthorized practice of law in New York because, under *Spivak v. Sachs*, lawyer's contacts with New York were "incidental and innocuous").

94. *See Gemayel*, 533 N.E. at 248–49.

95. *Id.* at 249. Compounding the uncertainty created by *Spivak* is the fact that the federal courts for the same state have shown commendable acceptance of a concept very much like the one urged here. In Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir.) (en banc), *cert. denied*, 385 U.S. 987 (1966), Judge Friendly held that a California lawyer who had spent a great deal of time in New York investigating, planning and negotiating settlement of a major antitrust claim on behalf of a New York client could collect his fee. The client, Skouras, had called Spanos in California and urged him to come to New York to assist local counsel in the federal court suit. *Id.* Judge Friendly first dissented from a panel determination that *Spivak* controlled in the diversity action and required avoiding Spanos's otherwise-valid fee claim. *Id.* In doing so, he stated that he did "not believe a federal court is so hamstrung by New York's parochialism" as did his fellow judges, and urged that federal law should "insulate[ ] him from New York decisions drastically limiting the permissible activity of out-of-state attorneys." *Id.* at 167-68. Judge Friendly's views prevailed. He went on to write the en banc opinion, holding that the client was estopped from claiming illegality—since local counsel could easily have moved Spanos's admission *pro hac vice* and because Spanos's ability to obtain such admission had been cut off by the client's discharge of him after receipt of his last bill. *Id.* at 168–69. Additionally, the client was estopped based on the vastly broader ground that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." *Id.* at 170. Regarding doubts about the continuing validity of the latter point, see *supra* note 27.

It is of interest that several bars, with contrasting lawyer memberships, filed amicus briefs in *Spanos* and were divided on the merits. The Association of the Bar of the City of New York—which was then and continues to be dominated by large-firm practitioners—and the Federal Bar Association of New York, New Jersey and Connecticut urged rejection of *Spivak*. *See Spanos*, 364 F.2d at 168 n.1. At the same time, the New York County Lawyers' Association and the New York State Bar Association urged variations on the "home-court advantage" concepts of *Spivak*. *Id.*

96. *See Spivak*, 211 N.E.2d at 331 ("The statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions."). As

A possible distinguishing argument along those lines was made by the lawyer in the Maryland decision of *Kennedy v. Bar Association of Montgomery County, Inc.*[97] Kennedy, the object of an injunction proceeding, was caught advising Maryland clients from his principal, and only office. Kennedy was rather plainly practicing law in unauthorized form. However, Kennedy argued that he should only be prohibited from advising on Maryland law and should be free to practice by advising on the law of states other than Maryland.[98] The Maryland court's rejection of Kennedy's position was twofold. The more substantive point, which was particularly compelling with respect to a lawyer who was plainly caught violating the law, was that allowing Kennedy to practice exclusively out-of-state law would involve a distinction "impossible to apply and enforce in the real world."[99] The second and less weighty argument, at least if considered apart from the first, was as follows:

> That construction of the statute [prohibiting unauthorized practice] would defeat the goal of protecting the public from incompetent and/or unethical practitioners . . . . Utilizing legal education, training, and experience an attorney applies the special analysis of the profession to a client's problem. Depending on the problem, that analysis may require consideration of federal, state, local or foreign law. Kennedy's theory of how [the unauthorized practice statute] operates would permit the unadmitted attorney to enter into attorney-client relationships and permit the unadmitted attorney to advise the client concerning only a portion of the general legal spectrum but then prohibit the unadmitted attorney from advising as to the balance of the spectrum.[100]

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noted elsewhere, to the extent that local admission is the exclusive basis for jurisdiction to discipline lawyers, the limitation is almost certainly self-inflicted. *See supra* note 64.

97. 561 A.2d 200 (Md. 1989).

98. *Id.* at 208. Before rejecting the distinction Kennedy was urging as nonsense, one should recall that many states employ the exact distinction he was urging with respect to foreign-country-admitted lawyers, who are permitted to practice in many states but only to the extent of advising on the law of their jurisdiction-of-admission. *See supra* note 70.

99. *Id.* One difficulty, perhaps less-obvious, is that proof of whether the lawyer was evading the limitation Kennedy urged would require a close examination of the advice that the lawyer in fact gave to clients. In many jurisdictions (although not all), such lawyer-to-client communications are protected against disclosure by the attorney-client privilege. *See generally* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 119 cmt. i (Tentative Draft No. 2, 1989). All jurisdictions, of course, treat as privileged confidential communications running from client to lawyer. Particularly in a case such as *Kennedy* where no client was complaining about Kennedy's law practice, and thus no client was present or motivated to refute an attempted showing of a violation of Kennedy's proposed limitation, it would be exceedingly difficult to offer concrete proof in an individual case of the content of the lawyer's advice.

100. *Kennedy*, 561 A.2d at 208.

Such an argument based on competence is unpersuasive. A fully informed client could be told of the lawyer's limited ability to advise. Indeed, the lawyer, as a matter of competence—including the avoidance of legal malpractice suits—would be motivated to inform clients that the lawyer was not providing a full array of legal advice which would be available from locally admitted lawyers. Many clients would be well-advised to reject such a truncated representation. Other clients who mastered the issue might wisely decide to retain such a lawyer, confident that only the law of another jurisdiction applied to their situation and that the lawyer was fully competent to assess issues under it. There seems nothing objectionable in permitting sufficiently informed clients to enter into such representations with less-than-complete scope.[101]

In the end, of course, the Maryland court was quite correct in upholding the finding of unauthorized practice, for the points (difficulty of enforcement and potential for incompetent advice) are only artificially separable. In point of fact, a lawyer such as Kennedy might be motivated to employ a foreign-law-only limitation on local practice as a shield behind which to conduct an unlimited-in-fact law practice. Among other things, such a lawyer would be motivated to cant advice artificially in the safe direction—away from local law and toward "authorized" law of foreign jurisdictions. At the very least, the limitation urged would create seams in legal advice where, in the interest of maximum competence, there should be none.

A different consideration was stressed by the Pennsylvania Supreme Court in *Ginsburg v. Kovrak*.[102] Similar to *Kennedy*, lawyer Kovrak argued that he should be permitted to maintain a law office in Pennsylvania, although he was not admitted there, because he intended to practice only federal law—tax law and the law of due process. Rejecting the invitation, the Pennsylvania court stated that "[t]he real point concerns practicing law of any kind and being subject to regulation as to mental and character fitness in the public interest."[103] Apparently, the point is that the Pennsylvania courts would

101. We have taken the position that an adequately informed client is free to agree with a lawyer for a scope of representation that is less than would otherwise, in the absence of the special agreement, be required to be provided by the lawyer in order to comply with standards of minimal competence and, perhaps, diligence. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 30(1) cmt. c (Tentative Draft No. 2, 1989). The chief tension raised by the section is with the prohibition, stated in RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 76(1) (Tentative Draft No. 7, 1994), against a prospective client limiting the lawyer's malpractice liability.

102. 139 A.2d 889 (Pa. 1958).

103. *Id.* at 893.

lack two of the principal bases on which the highest courts of all jurisdictions purport to be able to assure citizens that lawyers admitted to practice are competent—competence and character examinations at the point of admission and professional discipline thereafter.

The last to be discussed of the well-known and modern decisions restricting multistate law practice also employs unfortunately broad language to justify a sound result. In *Ranta v. McCarney*,[104] the North Dakota court held that a Minnesota-admitted lawyer who was unlicensed in North Dakota had committed unauthorized practice, and was thus denied his claim for fees.[105] The facts seem to make that a foregone conclusion. Lawyer Ranta provided legal services to at least twenty North Dakota clients, had practiced law for an extended period of time in North Dakota, and had opened a branch office in Bismarck to serve his clients.[106] His work for McCarney, evidently a North Dakota resident, involved the sale of McCarney's Ford dealership in Bismarck. Apparently Ranta advised McCarney only on the federal tax law aspects of the sale. As will be discussed, the opening of an in-state office alone may be an adequate basis for a finding of unauthorized practice. Nonetheless, the court's rationale was much more wide-sweeping.

Essentially, the court held that an out-of-state lawyer was subject to precisely the same restrictions on practice as an in-state lawyer suspended from practice for disciplinary reasons.[107] That proscription begins with a very broad description of the practice of law that includes "all advice to clients, and all action taken for them in matters connected with the law . . . ."[108] Those restrictions are especially severe because, as the court explicitly noted in a footnote,[109] a nonlawyer may perform some functions without offending unauthorized practice restrictions that are denied to a suspended lawyer. Apparently, that is because of the risk that, in performing them, the suspended lawyer will go further.[110] Taken at face value, the language of

104. 391 N.W.2d 161 (N.D. 1986).

105. *Id.* at 166.

106. *Id.* at 162.

107. *Id.* at 166.

108. *Id.* at 163 (quoting Cain v. Merchants Nat'l Bank & Trust Co., 268 N.W. 719, 722 (N.D. 1936), which cited and quoted in turn from *In re* Duncan, 65 S.E. 210, 211 (S.C. 1909)). The North Dakota court also quoted at length from the expansive definition of transactional unauthorized practice given in the much-quoted opinion *In re* Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935).

109. *Ranta*, 391 N.W.2d at 164 n.3.

110. The *Ranta* court cited and quoted from its earlier decision in *In re* Christianson, 215 N.W.2d 920, 925–26 (N.D. 1974), which held to that effect.

Ranta indicates that an unlicensed lawyer giving advice in North Dakota, no matter how fleeting the connection with the state, is engaged in unauthorized practice.[111]

The portrait of the precedent to this point may show too many warts. There are several decisions, including cases of decades ago,[112] in which "exceptions" to the prohibition against in-state practice by an out-of-state lawyer are recognized. A leading case of that sort is the decision of the New Jersey Supreme Court in *Appell v. Reiner*.[113] Reiner, a New Jersey resident, asked Appell, a New York lawyer not admitted in New Jersey, for legal help in working out creditors' claims. Reiner did this while physically present in Appell's New York City office on separate legal business contesting a will in New York. The claims of a New York City company constituted over fifty per cent of Reiner's total indebtedness. The remaining creditors were in New Jersey, and much of Appell's work was done there. The New Jersey court refused to prohibit Appell from collecting his fee. The court somewhat grudgingly found that the "peculiar" facts and circumstances indicated an "unusual" situation in which the "generally controlling principle" denying recovery should yield, due to the inseparability of the New York and New Jersey aspects of the work and the substantial size of the New York claim.[114] Paraphrasing slightly, the New Jersey test for inseparability requires the legal

111. *See Ranta*, 391 N.W.2d at 165 (rejecting suggestion of dissenting opinion that broad exceptions be created—exceptions that majority opinion seemed to favor, at least mildly, in its own opinion; majority responded that only legislation or formal rule-making by court could carve out exceptions).

112. *E.g.*, Cowen v. Calabrese, 41 Cal. Rptr. 441, 442–43 (Cal. Dist. Ct. App. 1964) (Illinois lawyer who came to California to advise California client, who had first sought lawyer's assistance at lawyer's Illinois office, in federal bankruptcy matter, could recover fees for work done in California; California statutes regulating practice of law apply only to practice in state courts); Brooks v. Volunteer Harbor No. 4, 123 N.E. 511, 512 (Mass. 1919) (Maine lawyer who, after request by Massachusetts client to provide services within state, told client that he was not locally admitted and that it would be necessary to retain local counsel, could recover fees for legal work performed in state). *See also* Freeling v. Tucker, 289 P. 85, 86 (Idaho 1930) (Oklahoma lawyer who made agreement outside Idaho to represent client's interest as heir in Idaho probate proceeding could recover fees for work, including two appearances in probate court in Idaho). The court stated:

> Respondent has not offended the spirit or intention of these statutes [requiring a license to practice law in the state], the facts of this case showing it to be one calling for the application of the rule permitting an attorney from a sister state, regularly admitted and licensed to practice therein, to make appearance in the courts of this state, as a matter of comity, incident to the disposition of a particular matter isolated from his usual practice in the state of his residence.

Id.

113. 204 A.2d 146 (N.J. 1964).

114. *Id.* at 148.

equivalent of a ball of wax,[115] together with a substantial percentage of the wax being located in the lawyer's home jurisdiction. Again, the court justified its approach on the grounds of: (1) the necessarily interstate nature of much law practice; and (2) the undesirability of limiting clients' choice of counsel so that multiple lawyers would be required for unitary tasks, leading to inefficiency and delay.[116]

The result in *Appell v. Reiner* should be applauded, although not necessarily all of its language, particularly if applied to significantly different facts. Even if the New York creditors' claim had not loomed so large, so long as it played some significant part, client Reiner's problem could realistically be called interstate in nature. Moreover, even if Reiner had no New York creditors, if Appell regularly advised Reiner and his business corporation concerning an array of legal matters, it would seem desirable to permit Reiner to retain the services of trusted regular counsel. In short, there should be sufficient room for notions of both discrete interstate matters and, more generally, clients whose matters are generally interstate in nature.

III. STRUCTURAL REFORM—IMPLAUSIBLE AND UNNECESSARY

The state of the precedent would seem to give serious pause to a lawyer considering venturing into unlicensed terrain on behalf of an interstate client. Because of the uncertainty, one sometimes encounters suggestions that the solution to the problem of interstate lawyering is to develop a workable administrative arrangement facilitating a national interstate bar. Further details are not typically provided, and one can appreciate why after trying to tease out such an arrangement. I will offer two models that might be imagined for implementing such a concept; one model is state-based, while the other model federalizes law practice. In my opinion, neither is acceptable when we see the "devil in the details." A far preferable solution—one that could readily be implemented with little or no structural change in the profession or in the way it is regulated—could be much more readily implemented by having courts more realistically redefine unauthorized law practice as it applies to interstate lawyering.

115. *See id.* at 147 (quoting counsel's description that Reiner's "financial problems coalesced into 'one ball of wax'").

116. *Id.* at 148.

A. *Structural Reform Through Universal State-by-State Lawyer Registration*

One imaginable structural solution to the present uncertainty surrounding interstate law practice would draw its inspiration from the device of *pro hac vice* appearances by litigators.[117] In this solution, a state would create a registration system requiring registration by a lawyer wishing to conduct an occasional office practice in that state. The lawyer would complete, sign and file a registration for each separate matter, possibly with the office of the state's bar disciplinary counsel. The registration could, for example, contain basic information about the lawyer—name, home office address, etc.—as well as consent to service with respect to activities constitutionally touching on the state, however that might be defined.[118] If the state thought it desirable, it probably would, or at least should,[119] subject the lawyer to the code of the state—with respect to in-state activities—regardless of what is provided in the lawyer code of the lawyer's "home" state. The state's statutes could further provide that, in the absence of registration, any lawyer "practicing law in the state," however defined, who had not filed a registration would be deemed to consent to designation of, say, the state's bar disciplinary counsel as the lawyer's agent for the receipt of service of process.

There are obvious difficulties with such a system. First, it would be enormously difficult and expensive to administer, at least in some states. If the existence of such a system in a state portends widespread enforcement of the unauthorized practice laws,[120] lawyers with even tangential dealings with in-state clients would be highly motivated to register. It is not unimaginable that for some states—Delaware, New York, California, etc.—the number of lawyers registering might approach half a million.[121] A separate bureaucracy would doubtlessly be required to administer the system. Simply in terms of increased complexity of administration, it is not at all clear that the costs would be warranted by the magnitude of the problem.

117. *See* Needham, *supra* note 18, at 130–31 (for suggestion of such system—although without thoroughly endorsing it).

118. On *in personam* jurisdictional issues arising in multistate law practice, see Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Lawyer*, 36 S. TEX. L. REV. 799 (1995). In view of the general availability of long-arm jurisdiction, the long-arm feature of the arrangement canvassed in the text may be superfluous.

119. *See supra* note 64.

120. *See supra* notes 15–18 and accompanying text.

121. Such a high estimate may also suggest to some cash-strapped states an opportunity for revenue by charging a fee for registration that would generate sufficient funds to cover, and perhaps exceed, the cost of the system.

B. Structural Reform Through a Truly National Bar

One might regard the source of most of our present difficulties in interstate law practice to be the failed system of state-by-state certification of lawyers. And, to be sure, the "solution" that one hears referred to most often is a "national bar." But how would one work? The modest version of such a proposal would provide that admission to the bar of any American jurisdiction would permit one to practice law unimpeded in any and all of the other American jurisdictions.[122] (We'll tackle the rest of the world, as the European Community has already done, on another occasion).[123] A significantly different and more modest variation is what I will suggest.[124]

But let our minds run more broadly for a moment: What about federalizing law practice, at least to make bar admission, discipline, and regulation uniform across all American jurisdictions in the only way that can be accomplished with assurance—through federal legislation and a federal-level administrative apparatus to deal with those activities.[125] A "National Bar Administration" (NBA) could move

122. A proposal differing in some respects from the national bar discussed here is urged in Comisky & Patterson, *supra* note 18, at 957. For a discussion of a "national registry" that would leave admission and discipline in the hands of individual states but provide a national license on registration with the registry, see Needham, *supra* note 18, (considering suggestion, but rejecting it, among other reasons, on race-to-the-bottom concern that states with less burdensome bar examinations, character-and-fitness, and similar admission requirements would become preferred resort of marginal applicants). Some proposals for reciprocity would avoid at least extreme forms of the race-to-the-bottom phenomena by installing a national bar-admission test. *See Full Admissions Reciprocity Is In-House Lawyers' Goal*, 9 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 352 (1993) (reporting panel discussion of such concept). Perhaps the most sympathetic argument for federalizing law practice is the imaginative, yet unconvincing, account in Zacharias, *supra* note 18, at 345–71.

123. *See, e.g.*, Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 782–87 (1994); Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 559–61 (1992).

124. *See infra* notes 139–54 and accompanying text.

125. Among its other shortcomings, such federal legislation would stand on somewhat debatable constitutional foundations. It requires an exuberant interpretation of the Interstate Commerce Clause of art. I, § 8, to argue that interstate commerce is impacted by providing assistance in a divorce or child custody matter in another state. It is true that the often-cited Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (Congress had commerce clause power to regulate farmer's growing of wheat for family's own table), seems to trivialize any judicial role in enforcing the commerce clause as a limitation on Congress' power. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.5 (2d ed. 1988). But the traditional, long-standing power of courts to regulate lawyers would move Congress into regulatory terrain that it has never so boldly attempted to occupy. *See* WOLFRAM, *supra* note 1, § 2.2

A different argument has been based on Congress' power to establish courts inferior to the Supreme Court. *See* Comisky & Patterson, *supra* note 18, at 972–75. But the

into quarters shortly, we are told, to be vacated by the Interstate Commerce Commission. Lawyers could carry their federal license to practice to any jurisdiction. The artificial barriers of state lines would be obliterated by the force of the Supremacy Clause, and the needs of clients alone, not the vagaries of licensure, would determine where a lawyer could permissibly practice.

Again, when one presses the details, or perhaps sooner, the reasons why the idea is poor, if not absurd, are readily apparent. Most obviously, the current political environment is not conducive to such an idea. The same Congress that has set its sights on uprooting existing federal bureaucracies, in some instances wholesale, would hardly be interested in creating a new one. Beyond the pragmatic, the constitutional basis of the power of Congress to enact such a sweeping scheme is problematic. Perhaps of greatest importance, powerful lessons from history should give pause to anyone who might be tempted to think that a federal agency with plenary power to regulate lawyers would solve more problems than it would create.

The closest the federal government has come to authorizing a federal agency to credential professionals has involved the much more modest efforts of three federal agencies—the Patent and Trademark Office (PTO),[126] the Internal Revenue Service (IRS),[127] and the Securities and Exchange Commission (SEC).[128] The list is not exhaus-

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Supreme Court has never suggested that the power extends to regulations that would affect *state* courts and their traditional power to regulate lawyers appearing within the state, either in court or in law offices, to practice state-based law.

126. The PTO disciplines practitioners before the agency under explicit statutory authorization. *See* 35 U.S.C. § 32 (1988). In 1984, the agency issued regulations setting out a new code of ethics, modeled on the 1969 ABA Model Rules of Professional Responsibility, which were more regulatory and less client-centered, and established a new division of the agency to prosecute and try disciplinary cases. *See* 49 Fed. Reg. 10,012 (1984). For the eventual rules, see 37 C.F.R. §§ 10.23 *et seq*; on the procedural arrangements, see 37 C.F.R. § 10.130 *et seq*. The new arrangements were controversial among elements of the patent bar when first proposed. *E.g.*, Rich Arthurs, *New Practice Rules Contain Pitfalls, Say Patent Lawyers*, LEGAL TIMES, Feb. 18, 1985, at 1 (noting criticism of PTO by ABA for failure either to adopt 1983 Model Rules of Professional Conduct or else to defer to state of lawyer's admission); Rich Arthurs, *PTO Revises Proposal Covering Lawyer Discipline*, LEGAL TIMES, Apr. 2, 1984, at 4 (reporting publication of revised regulations and bar reactions); Martha Middleton, *A New Patent on Discipline?*, NAT'L L.J., Nov. 21, 1983, at 2 (reporting critical reaction to originally proposed regulations).

127. 31 U.S.C. § 330 (1988) (authorizing Secretary of Treasury to discipline persons practicing before Treasury Department, including Tax Court); *see generally* Kurtis A. Kemper, Annotation, *Disciplinary Action Under 31 USCS § 1026 Authorizing Secretary of Treasury to Suspend and Disbar Any Person Representing Claimants From Further Practice Before the Treasury Department*, 50 A.L.R. Fed. 817 (1980).

128. 17 C.F.R. § 201.2(e) (1994) (giving SEC power to decide if any attorney should be allowed to appear before it). The modern history of the SEC's efforts to regulate lawyers

tive. Other federal agencies, including the Interstate Commerce Commission itself,[129] have claimed the power to regulate lawyers.[130] The Office of Thrift Supervision and its highly controversial effort to bring law firms to leash in the *Kaye-Scholer* case[131] is perhaps the

practicing federal securities law stem from SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 712 (D.D.C. 1978) (lawyer civilly liable for aiding and abetting client by failing to attempt to prevent securities violation); and *In re* Carter & Johnson, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981) (because of prospective application of rule so requiring, lawyers who did not take steps reasonably calculated to prevent client's security violation are not subjected to agency discipline). Opposition from the bar was immediate and strong. *See Editorial Opinion & Comment*, 68 A.B.A. J., Jan. 1982, at 8 (questioning SEC's authority to regulate legal profession); David Ranii, *ABA Opposes Securities Lawyers' Code*, NAT'L L.J., Dec. 7, 1981, at 5. Professional opinion was organized in opposition. *E.g.*, Dennis J. Block & Charles J. Ferris, *SEC Rule 2(e)—A New Standard for Ethical Conduct or an Unauthorized Web of Ambiguity?*, 11 CAP. U. L. REV. 501, 517–24 (1982) (questioning meaning of SEC Rule 2(e) and how it should be interpreted); Samuel H. Gruenbaum, *The SEC's Use of Rule 2(e) to Discipline Accountants and Other Professionals*, 56 NOTRE DAME L. REV. 820, 837 (1981) (SEC's broad powers may be curtailed in the future); Stanley A. Kaplan, *Some Ruminations on the Role of Counsel for a Corporation*, 56 NOTRE DAME L. REV. 873, 878–82 (1981) (criticizing SEC's attempt to regulate legal profession); Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50 (1981). For more measured views, see generally, Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1983); Note, *SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 MICH. L. REV. 1270 (1981).

The power of the SEC to discipline professionals was upheld in Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979). The court, in dicta, swept lawyers within the regulatory power. *Id.* at 578, 581. *See also* Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 122 (1926) (upholding power of Board of Tax Appeals to adopt rules of practice for professionals); *In re* Rhodes, 370 F.2d 411, 413 (8th Cir. 1986), *cert. denied*, 386 U.S. 999 (1967) ("It is elementary that an administrative agency which has the authority to admit attorneys to practice before it has the concomitant power to disbar, suspend, or otherwise discipline those attorneys for unethical conduct.").

In August, 1982, the ABA House of Delegates endorsed a legislative proposal that would prohibit federal administrative agencies from exercising disciplinary jurisdiction over a lawyer other than in reciprocity with discipline previously administered in the lawyer's home jurisdiction. *See* 51 U.S.L.W., August 24, 1982, at 2123. The ABA had earlier rejected a recommendation of its own Standing Committee on Professional Discipline that would have vested federal agency disciplinary jurisdiction in the United States District Court for the District of Columbia. *Id.* Following, and perhaps as the result of, the furor stirred up by the Carter & Johnson initiative, the SEC has been relatively inactive in regulating lawyers. *See generally Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1614–23 (1994).

129. *E.g.*, DePass v. B. Harris Wool Co., 144 S.W.2d 146, 148 (Mo. 1940) (non-lawyer could recover contractual fee for representation before ICC when person was duly admitted and licensed to practice before agency).

130. *E.g.*, Charlton v. Federal Trade Comm'n, 543 F.2d 903 (D.C. Cir. 1976); 8 C.F.R. § 292.3 (1990) (Immigration and Naturalization Service); 16 C.F.R. § 4.1(e) (1994) (Federal Trade Commission); Katy Motiey, Note, *Ethical Violations by Immigration Attorneys: Who Should Be Sanctioning?*, 5 GEO. J. LEGAL ETHICS 675 (1992).

131. *In re* Fishbein, Office of Thrift Supervision, OTS AP-92-19, March 1, 1992. The agency entered a temporary order to cease and desist—the "freeze order". *Id.* On the

most well-known recent example. Despite the fact that several Kaye-Scholer lawyers consented to regulatory restrictions on their practice in settling the case,[132] the Office of Thrift Supervision, unlike the other three agencies, has made no sustained effort to create its own admission-regulation-discipline system, as have the three named agencies. Each of those agencies maintains an active system of screening applicants for admission to the agency's bar. Each actively maintains a system of regulation (in the case of the PTO with specific lawyer-code rules that can be found in the Code of Federal Regulations)[133] and each actively disciplines wayward professional licensees. The three agencies have been at this work for a considerable period of time. A quaint tradition in the PTO is illustrative. The PTO sequentially numbers certificates admitting its lawyers and agents to practice, beginning with the first certificate issued almost two-hundred years ago to Alexander Hamilton.

Does the relative success, to whatever degree it has been achieved (and the degree is controversial),[134] of the Big Three of federal lawyer-licensing agencies indicate that a unified national bar would significantly improve the present state of Balkanized regulation? I doubt it very much, and for a reason that really does not deal so much with traditional concerns about the efficiency of federal bureaucracies—a vital dimension of the overall issue, to be sure.

My principal concern deals with another objection altogether—the threat to lawyer independence that such a unified agency bar could portend. Whatever else federal bureaucracies might be, they are clearly subject to political control and influence. It is readily imaginable that the potential power of a National Bar Administration would prove irresistibly attractive to one powerful pressure group or another as a way of exerting control over the ways that lawyers repre-

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Kaye-Scholer problem of lawyering in regulated industries, see generally *Symposium: The Attorney-Client Relationship in a Regulated Society*, 35 S. TEX. L. REV. 571 (1994); Development Note, *Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1605–14 (1994).

132. *See* Teresa S. Collett, *Foreword*, 35 S. TEX. L. REV. 571, 571 (1994) (discussing internal policy changes while representing banking clients).

133. *See supra* note 126 and accompanying text.

134. The ABA has long opposed the concept of federal administrative regulation of lawyers, although criticism rarely focuses upon the way in which existing regulation affects lawyers and clients. Instead, the ABA opposes additional regulation or instances of existing regulation, particularly by the SEC. *E.g.*, 50 U.S.L.W. Dec. 8, 1981, at 2344 (adoption by ABA Board of Governors of resolution attacking SEC's efforts to set ethical standards for lawyers who practice in securities field).

sent their clients.[135] One can imagine, to take only one relatively modest example of those imaginable, a proposal to reverse the "watering down" (as proponents of the measure would put it) of Federal Rule of Civil Procedure 11 by its 1993 amendments. They would seek reversal through amending the NBA's Rule 3.1[136] to restore the pre-1993 requirements of Rule 11.[137] My point is not to take sides in the current debate on recapturing the soul of Rule 11 (although I am generally hawkish, and thus support a regime much more like the one that obtained between 1983-1993 than that in existence since 1993).[138] I wish to make the different point that existence of such a thing as the NBA would occasion sustained efforts to bend the legal profession to the will of political forces in a way that would threaten the independent bar as it has existed throughout the history of the United States.

IV. COMMON LAW REFORM THROUGH REDEFINING INTERSTATE UNAUTHORIZED PRACTICE

Far preferable than radical administrative or structural solutions at either the state or national level would be to come back to the judicial approach that has become encrusted on the subject of unauthorized practice by interstate lawyers and rethink it. Such an exercise yields bountiful reasons for changing the judge-made rules while preserving the sensible practice habits and traditions of interstate law practice.

To start at the beginning, the principal doctrinal move of a court refusing to permit an out-of-state lawyer to recover a fee is that the lawyer, being unlicensed in an occupation that requires licensing, has

135. Lest I be accused of political naivete, let me rush to acknowledge that the present system of state-based lawyer regulation is itself profoundly subject to political influences. One difference may be that groups interested in preserving lawyer independence (often for non-altruistic reasons)—primarily local bar organizations—have very significant control over local bar regulation, from the process of developing lawyer-code rules to the process of discipline. *See generally* WOLFRAM, *supra* note 1, § 2.6. There is no assurance that the relatively much more immobile American Bar Association would or could serve a similar watch-dog function over a national bar regulatory body.

136. Transparently, I here refer to a possible amendment—one that the American Bar Association would never seriously consider—to ABA Model Rule 3.1 (1983), replacing its "not frivolous" standard for filings with a more exacting standard.

137. Among current legislative proposals to repeal some or all of the 1993 amendments to Rule 11 and return to stricter standards, see Common Sense Legal Reforms Act of 1995, 104th Cong., 1st Sess. (1995); Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995) ("requir[ing]" sanctions for violations rather than "permitting"); Lawsuit Reform Act of 1995, S. 300, 104th Cong., 1st Sess. (1995) ("requires" sanctions for violations rather than "authorizes").

138. On the 1993 amendments to Rule 11, see, e.g., *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1629–51 (1994).

offended a strong state public policy, thus warranting forfeiture of the fee claim.[139] Fundamental to such a determination is a subsidiary finding that the lawyer in question has engaged in unauthorized practice within the jurisdiction. But the responsibility for defining what is and what is not unauthorized practice is, primarily if not exclusively,[140] that of the courts. In shaping that definition, courts on occasion, have been insufficiently attentive to the needs of the national economy and its inevitable interstate implications.[141]

The reshaped doctrine should go two steps further than it has to date. First, it should recognize the significant desirability of interstate law practice by creating a presumption of regularity of a lawyer's extra-jurisdictional work so long as it falls within a broadly permissive pattern of genuine interstate legal work. Second, present doctrine concerning fee forfeiture for violation of what remains of restrictions on law practice by out-of-state lawyers should be modified. Fee forfeiture should occur only if: (1) the client complaining of the lawyer's practice beyond state lines can demonstrate, in effect, legal malpractice—significant harm proximately caused by the lawyer's unauthor-

139. *E.g.*, McRae v. Sawyer, 473 So. 2d 1006, 1008 (Ala. 1985) (action by out-of-state lawyer to recover fees from in-state client); Shapiro v. Steinberg, 440 N.W.2d 9, 12 (Mich. Ct. App. 1989) (action by out-of-state lawyer to enforce fee-splitting contract with in-state lawyer). *See also* Perlah v. S.E.I. Corp., 612 A.2d 806, 809 (Conn. App. Ct. 1992) (lawyer licensed only in New York who practiced from office in Connecticut while awaiting admission to Connecticut bar could not recover fees for in-state work for Connecticut client in acquiring New York corporation).

140. At the very least, there is general agreement that courts possess the inherent power to control unauthorized practice, which clearly encompasses the power to define it. *E.g.*, Henize v. Giles, 490 N.E.2d 585, 588–89 (Ohio 1986) (recognizing power to protect public but not at expense of public good); State v. Dinger, 109 N.W.2d 685, 692 (Wis. 1961) (recognizing court's power to regulate practice of law). This is a matter of necessity in most jurisdictions, as the legislatures that enact regulations affecting unauthorized practice typically do not define the term. *E.g.*, State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976). Courts in some jurisdictions have gone further and claimed that the definition of unauthorized practice, because it touches on the practice of law, is within the exclusive competence of the courts, and that other branches of government are precluded by the state's constitution from trenching on that authority. *See supra* note 3. While such claims are probably extravagant in most jurisdictions, see WOLFRAM, *supra* note 1, § 2.2.3 at 28–31 (critiquing overly-broad applications of "negative aspect" of inherent-powers doctrine), the point is irrelevant to the approach suggested in the text.

141. Some courts have been apparently sympathetic to such needs, but have responded with decisions that are more ingenious than sound. *E.g.*, *Shapiro*, 440 N.W.2d at 11 (striving to define "practice of law" to exclude everything but appearing in court so as to preserve ability of out-of-state lawyer to fair share of agreed-upon fee split). Others, similarly sympathetic in their result, have relied upon unreasoned fiat for announcing that an in-state activity did not constitute unauthorized practice. *E.g.*, Lindsey v. Ogden, 406 N.E.2d 701, 708 (Mass. App. Ct. 1980) (without explanation of result, court holds that New York lawyer who oversaw execution of will of Massachusetts client in Boston did not engage in unauthorized practice).

ized practice; or (2) the lawyer's violation was palpable, so that it appears that the lawyer could not reasonably have believed that their practice was authorized in the jurisdiction in which the lawyer was physically present to perform the work.[142]

A de facto version of something close to such a treatment already exists in some jurisdictions with respect to lawyer-unauthorized-practice rules in the case of in-house corporate counsel.[143] For example, when the Florida bar proposed a new rule to the Supreme Court of Florida that would have given in-house counsel a grace period of three years within which to apply for local admission, the court rejected the rule on the ground that it was too restrictive "to meet the legitimate needs of business in a modern economy."[144] The court's preferred version of a rule on the same subject would permit in-house counsel to practice in Florida indefinitely and would not require any particular period of practice in the state of original admission.[145]

142. Because I say nothing else about the fee-forfeiture remedy, it may be useful to add parenthetically that the proposed "no harm, no foul" rule is not a rule of legal malpractice. Specifically, there should be no necessary correspondence between the extent of the client's harm caused by the out-of-state lawyer's mishandling of a local-law matter and the size of the lawyer's lost fee. The lawyer's misstep on a significant issue of local law should suffice to impose forfeiture.

143. An examination of state regulation of out-of-state lawyers would indicate few concessions to the very different situation of in-house lawyers, who work for single employers that are almost invariably highly sophisticated in the use of legal services. But in fact in-house counsel typically move about the country, often as a matter of permanent transfer from one corporate office to another, and often without particular regard for formal in-state licensing rules. An important and recent empirical study indicates that bar-disciplinary authorities in many states are both aware of the phenomena and have no serious objection to it. *See* Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum?*, 77 MARQ. L. REV. 307 (1994). For an earlier impression that such was the case, see Needham, *supra* note 18, at 125–26.

The differential treatment of in-house counsel can have a dark side, exemplified by refusal of some states to accept work of in-house counsel as qualifying as the "practice of law" for the purpose of the states' durational-practice requirement for admission on-motion. *See* Brakel & Loh, *supra* note 18 (noting more restrictions by some states on corporate counsel).

144. *See* Current Reports, *Full Admissions Reciprocity Is In-House Lawyers' Goal*, 9 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 351, 352 (1993).

145. *Id.*; *see also* Current Reports, *Florida Rejects Restriction on Practice by Inside Counsel*, 7 Laws. Man. on Prof. Conduct (ABA/BNA), Current Reports at 389, 390 (1991) (grounds for Florida court's concern included warning from Walt Disney World Co., one of state's largest employers, that bar's more restrictive proposal would provide strong disincentive for large companies to base operations in Florida). *See also* The Florida Bar Re Amendments to Rules, 593 So. 2d 1035, 1036 (Fla. 1991) (proposed rule on out-of-state corporate counsel should be changed).

A. *Presumptively Regular Interstate Law Practice*

Present doctrine relies far too heavily on a perceived need to employ draconian measures to warn out-of-state lawyers from the field of in-state law practice. Courts should instead recognize that interstate practice runs along a continuum from the plainly offensive through the uncertain to that which everyone would concede is legitimate and desirable. A worthwhile effort would be to attempt to conform discussion in opinions more to those realities. The touchstones of such an approach should be an assessment of the frequency of the lawyer's in-state practice and the interstate features (or lack thereof) of the particular client matter that brings the lawyer into the state.[146]

1. *Frequency of In-State Practice*

Plainly offensive, and thus subject to the available remedies against unauthorized practice, is local work carried on by an out-of-state lawyer from a permanent in-state office or similar base.[147] I do not necessarily suggest that all such practice should be proscribed, including occasions on which the question arises in the course of drafting a regulation. I speak here only of how courts should decide practice issues that arise as common-law matters. It would be entirely consistent with the no-office limitation, however, for a lawyer representing a corporate client to be provided a temporary office in the company's in-state facility or to rent temporary office space for the purpose of working on a temporary in-state assignment for a client in an otherwise interstate matter.

The number of client matters that brings a lawyer into the state is also relevant. At the offensive end, a lawyer with a large percentage of practice requiring the lawyer to work in another jurisdiction (and contriving somehow to do so without a local office) is practicing in an unwarranted way.[148] That does not, of course, preclude representa-

146. Michigan for decades has given statutory permission to out-of-state lawyers to practice law (at least to give advice) within the state so long as their presence in the state is on a temporary basis and on a specific matter. *See* MICH. COMP. LAWS ANN. § 600.916 (West 1948) (specifically excepting out-of-state attorneys from unauthorized practice statute).

147. A surprisingly large percentage of reported decisions imposing remedies against out-of-state lawyers have involved practice from permanent in-state offices. *E.g.*, Perlah v. S.E.I. Corp., 612 A.2d 806, 807 (Conn. App. Ct. 1992) (sole office); Brookens v. Committee on Unauthorized Prac. of Law, 538 A.2d 1120, 1124 (D.C. 1988) (sole office); Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 207 (Md. 1989) (sole office); Ranta v. McCarney, 391 N.W.2d 161, 165 (N.D. 1986) (branch office).

148. Here as elsewhere, my assumption is that work "in" a state has the lawyer physically present there. In contrast, lawyers admitted to practice where they maintain an office

tions involving multiple visits to the jurisdiction or representation of multiple clients there.[149] No attempt should be made to construct bright-line rules based on the number of in-state matters handled by a lawyer in a particular period of time, such as a year.[150]

2. *Significant Interstate Features*

Assuming infrequent in-state law practice, the second component of the suggested approach is that the interstate features of the particular client matters bringing the lawyer into the foreign jurisdiction should be significant.[151] At the offensive end of the spectrum would be a representation by an out-of-state lawyer involving only local clients and a local matter.[152] In general, compliance with the interstate-features requirement would require that the factual context of the transaction should have significant interstate aspects. That would be satisfied in the instance of a sale of a business in one jurisdiction to a

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may serve as outside general counsel to a business physically located in a jurisdiction in which the lawyer is not admitted, with the lawyer entering that jurisdiction only occasionally. That situation is plainly distinguishable.

149. For example, the representation involved in Appell v. Reiner, 204 A.2d 146, 147 (N.J. 1964), involved multiple clients. *See supra* notes 113–116 and accompanying text.

150. Some courts do attempt to control *pro hac vice* appearances through a number-per-period rule. *E.g.*, Brookens v. Committee on Unauthorized Prac. of Law, 538 A.2d 1120, 1123–24 (D.C. 1988) (affirming finding of contempt on part of out-of-state lawyer for exceeding five-per-year limit stated in court rule on *pro hac vice* appearances), but the situation is readily distinguishable. Most obviously, litigation (in which *pro hac vice* appearances alone are relevant) typically will involve a more extended course of legal work in the jurisdiction. Moreover, court appearances are much more readily numbered than transactional representations could be.

151. At this point, there is an important interconnection between this analysis and the analysis pursued in the contribution to the Symposium of Edward A. Carr and Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859 (1995). Take a lawyer retained by a railroad union to be available to represent injured workers in a three-state area in filing FELA claims. *See* Brotherhood of R.R Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 2 (1964) (describing Trainmen's "regional counsel" system). A literalist might assert that all of the preparatory work that the lawyer may do in a foreign jurisdiction—discussions with the client, investigating the facts, securing statements from possible witnesses, even negotiating the terms of a settlement prior to filing suit—may have no adequate interstate connection and thus fall outside the test proposed here. (On a literal level I would agree.) On the other hand, until a suit is filed and *pro hac vice* appearance is perfected, it could be claimed that the lawyer draws no legitimacy from the prospective availability of such a possible allowance. The claim breaks down at that point. In my view, the prospective availability of *pro hac vice* appearance is what legitimizes all pre-suit activity within a foreign jurisdiction, and it should be recognized to do so in the hypothetical instance as well.

152. *E.g.*, Lozoff v. Shore Heights, Ltd., 362 N.E.2d 1047, 1048–49 (Ill. 1977) (Wisconsin lawyer not admitted in Illinois could not recover legal fees for representing Illinois client involving sale of Illinois land involving only other Illinois parties).

client with a home office elsewhere.[153] Similarly, an out-of-state financial-services lawyer should be able to travel to a foreign jurisdiction to negotiate terms of a loan or workout on behalf of a home-jurisdiction financial institution. It should suffice for this purpose that the interstate elements are significant; it should not be further required that they predominate. Again, the driving notion is client need, and it certainly will be true in many instances of significant interstate facts that the client would be better served by legal services provided by familiar, regular counsel or counsel particularly skilled in dealing with a particular specialty. That need is sufficiently suggested by significant interstate facts.

While this will often be the case, it should not be independently required that the law applicable to the client matter transcend the local jurisdiction, involving either the law of another jurisdiction or federal law. The applicable law often cannot be known when a representation is undertaken, and requiring withdrawal on later realization that only local law will apply would be unduly disruptive of many representations. In any event, the foreign-based lawyer should be held to the normally applicable standard of competence with respect to questions of local law.[154]

B. Legislative and Rule-making Clean-up

In a few jurisdictions, even if courts were otherwise disposed to adopt the proposed approach to interstate lawyering, further obstacles might remain that could be fully corrected only through legislation or rule-making. The problem is that in-state practice by an out-of-state lawyer may be prohibited by a statute or rule that peculiarly does not permit an interpretation consistent with the analysis proposed here.[155] For example, in Illinois, a statute states very broadly that "[n]o person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney."[156] Another exam-

153. *See supra* note 17 and accompanying text.

154. *See supra* notes 19–23 and accompanying text.

155. In a few states, the power to define unauthorized practice may be a rulemaking function performed by the judicial system itself. *E.g.*, N.D. CENT. CODE § 27-02-07 (1992) (in statute prohibiting unauthorized practice of law, what constitutes such is to be determined through rulemaking by state's supreme court).

156. ILL. REV. STAT. ch. 13, ¶ 1 (1973), as construed in Lozoff v. Shore Heights Ltd., 362 N.E.2d 1047, 1049 (Ill. 1977) (recognizing court's ultimate power to control practice of law). On the other hand, the great breadth of the Illinois statute strongly suggests that, in a proper case, it should be interpreted narrowly. For example, its literal terms would suggest that a Wisconsin lawyer forced to sue a Wisconsin client for fees in Illinois could not recover. An Illinois court, of course, would undoubtedly apply customary choice of law rules,

ple, which turns out to be a counter-example, is California. Under one interpretation, the words of a California statute seem to preclude an out-of-state lawyer from "practic[ing] law in California" unless locally admitted.[157]

But many such statutes and rules present difficulties only when read in particular, and perhaps strained ways. Where possible under local precedent, a court would be well advised to select an available interpretation that promotes a healthy practice of interstate lawyering.

V. CONCLUSION

The uncertainties of interstate practice are both real and substantial, and they reflect poor state policy. The justifications for providing broad permission to genuinely interstate law practice are powerful; any argument against such practice either must ignore the present realities and desirability of interstate dealings by clients or be rooted in concern for the competitive advantage of local lawyers that ill serves a vibrant national economy. The steps proposed here are both modest and, for the most part, readily accomplished through judicial decision. Respect for state sovereignty, and thus for state lines, is a necessary and appropriate consequence of federalism. But, consistent with that respect, lawyers and their interstate clients should be free to approach interstate legal matters without concern for undesirable and artificial restrictions imposed by state lines.

to avoid the literal application. So also, it may be possible for an Illinois court to construe the statute not to apply to a genuinely interstate representation.

157. CAL. BUS. & PROF. CODE § 6125 (West Supp. 1995) ("No person shall practice law in California unless the person is an active member of the State Bar."). Of course, the statute is susceptible of many readings, only one of which would apply it to any legal work in California by an out-of-state lawyer. Under that restrictive interpretation, the statute is probably violated by thousands of out-of-state lawyers daily.